LUBICON LAKE INDIAN BAND - INQUIRY

DISCUSSION PAPER

Introduction

This Discussion Paper has been prepared in accordance with Item 10 of the agreed Schedule for this Inquiry.

Attached hereto immediately following this Introduction is an Index in the form of a chart showing how the subject matter has been organized under various Heads of Claim. These Heads reflect the "Points For Discussion" put forward by the Band for the purpose of a meeting with the Minister on November 26, 1984, although not necessarily in the order therein appearing. These points or claims have served as the agenda for discussions and meetings with the parties and their representatives to date.

As shown on the Index-Chart, each Head of Claim (or sub-head) is followed successively by sections which set out respectively the positions of the Band, of Canada, and of Alberta with respect to that claim; then by a section which endeavors to identify the interests of any Third Parties who may be involved or affected, with a brief statement of the positions of those Third Parties; and finally by a "Remarks" section. The contents of the "Position" sections contain a summary of the positions of the respective parties as I so far understand them to be on the basis of my discussions with them and their representatives to this date. The same is true with respect to the sections setting out the interests of Third Parties. In the "Remarks" sections I have endeavored to summarize the areas where there appears to be agreement or disagreement and, in the case of the latter, to suggest possible areas of accommodation or methods of reconciliation where discussions to date, or further reflection, have suggested such possibility.

The material which follows thereafter reflects this organization Index-Chart, which also shows the number of the page on which each of the sections commences.

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Claim - 1. ENTITLEMENT TO RESERVE

Band's Position

The Band should receive a Reserve at the Western end of Lubicon Lake to include the site agreed on in 1940, to consist of a total area calculated on a basis which would render to the Band no less than the allotment calculated in accordance with Treat 8 based on a membership of at least 347 (as determined by joint Band-ONC Genealogical study). Historically, the basis of entitlement is numbers properly eligible for membership at the date of survey. On this basis the total number to be counted to establish actual entitlement according to today's criteria for eligibility is in excess of 400. This would entitle them to an area at least twice, and probably three times, as large as the 25.4 sq. mi. set aside in 1940; the Band claims that this extra area should adjoin the 25.4 sq. mi. at the south-west end of Lubicon Lake and extend thence easterly along the south shore of the lake. Also, two non-contiguous areas are sought as recognized Band lands. These lands are the site of residences of Band members and of cemeteries of Band forebears, and consist of areas of approximately one square mile each on the eastern shores of Bison and Haig Lakes.

As to the interests of others in the surface of the area claimed, or sought, as Reserve land, the position of the Band is that:

(a) they are prepared to recognize and confirm such small holdings as may be within the Reserve area, including the 160 acre homestead applied for by Mr. L'Hirondelle, and present Oil and Gas Company access and other surface holdings;

(b) the Sawan and Calihaisen leases are not within the area claimed or sought, and are not challenged; nor is the Little Buffalo Hamlet challenged;

(c) the area to the South and East of Lubicon Lake in which the Band is interested as the extra area to be included beyond the agreed 25.4 sq. mi., does not to their knowledge include any other surface holdings save possibly Oil and Gas Company rights as in category (a) above, which again are not challenged.

This leaves two known areas of contention. The first is the two large agricultural leases presently held by the Co-op, of which the present membership consists entirely of members of the L'Hirondelle family. The principal lease was issued in 1975 for a term of 25 years. The second matter is Grazing Lease 38048, which was renewed on April 1, 1985, and on which new developments have taken place since these matters were initially discussed. The Band's position is that this Lease should be dealt with in the same way as suggested below for the other Co-op leases.

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Band's Position (cont'd.)

The Band's position is that these leases should be terminated on transfer of the land to Canada as its Reserve, as the area in question will be required for the Band's own intended agricultural undertakings. The Band takes no position on whether compensation should be paid to the L'Hirondelles for this termination, except that it should not be in any way at the Band's expense. In support of its position the Band emphasizes that when the leases were first entered into, and also when renewed, it was known to the L'Hirondelles that they were situated entirely within the 25.4 sq. mi. claimed by the Band as its Reserve. The Band is opposed to the idea of leaving the leases undisturbed and extending the boundaries of the Reserve by a corresponding acreage, as the lease areas lie at the heart of the Band's traditional homeland and are so substantial and are so centrally located as to be an impediment to the cohesive and efficient operation of the Band's intended agricultural activities.

Position of Canada

The Band is entitled to a Reserve, which is to include the area at the western end of Lubicon Lake agreed to in 1940. The membership figure to be used to calculate the total area is to be the figure at date of survey - i.e. the present number. The starting figure for this purpose is 182 (present registered membership) to be increased to a number between 250 - 300 if the criteria as to eligibility for membership in the Indian Act prior to the 1985 changes ("the old Act") are applied, or between 350 - 400 if the provisions of the new Act are applied. Canada will in due course put forward a firm number with the formal request for transfer of the land accordingly, and make available to Alberta the material on which this figure is based, although this material may not include the Joint Genealogical Study unless the Band consents. As to the location of the extra area involved, Canada supports the Band's position.

Canada has not as yet indicated any official position with regard to termination or otherwise of the agricultural leases, but neither has it specifically opposed the suggestion for termination and adequate compensation.

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Position of Alberta

Subject to reservations as to protection of existing interests of third parties, Alberta raises no objection to location, or to entitlement in principle. Subject thereto, Alberta remains ready to honour the commitment of 1940, and to transfer the 25.4 sq. mi. at the western end of Lubicon Lake as agreed in 1940 - which was on the basis of a Band membership of 127. Alberta awaits receipt of a validated claim and request for transfer from Canada accordingly; but if the claim and request put forward is based on a figure of Band membership in excess of 127, Alberta reserves the right to challenge that figure and the entire basis of calculation, including the calculation of 127 in 1940. Alberta claims to have information which shows that the number entitled to be counted in 1940 was considerably less than 127, and that the numbers so entitled today are very much lower than the figures put forward by the Band and discussed by Canada.

Third Party Interests

The Metis Association, through its leader, Mr. Sam Sinclair, has stated that it supports the Band's claim to a Reserve in the area, provided that the rights of all Native people are acknowledged and protected. It appears that there will be no conflict in respect of the areas discussed, with the exception of the agricultural leases.

Chester L'Hirondelle, speaking for himself and the 10 members of his family who are the present and only members of the Co-op (which is the actual holder of the agricultural leases in question) is opposed to the idea of their receiving compensation and having to move elsewhere to carry on their livelihood. He said it would be more sensible for their leases to be left undisturbed, and for the boundaries of the Reserve to be adjusted to take in an equivalent additional acreage. He spoke of the active pursuit of the land claim as being a comparatively recent development, which would put it as a matter revived only after the agricultural leases were first taken out. His position is, in effect, that the agricultural leases were granted when the claim to a Reserve was entirely in abeyance, and that in fact the Band had knowledge of the existence of the leases when they revived this claim.

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Third party Interests (cont'd.)

As to the suggestion that a possible solution might be for the leases to remain in the name of the Co-op, but membership in the Co-op be fully opened to members of the Band, so that the original position might be restored and the agricultural activities be pursued as a truly joint venture, Mr. L'Hirondelle was entirely non-committal. He said only that the present Board of Directors of the Co-op would have to decide on any application for membership.

The Oil and Gas Companies concerned expect to have their present interests, including the location of and rights of access to installations and works, protected in any arrangement made for the setting up of the Reserve, whatever may be its size or boundaries. This does not conflict with the Band's position.

Remarks - Including Areas of Possible Reconciliation or Accommodation

There appears to be general agreement that the Reserve should be located at the western end of Lubicon Lake. Alberta is prepared to agree to the setting aside of the 25.4 sq. mi. previously agreed, subject to its reservation as to disputing the actual area if other numbers are to be put forward. The Band and Canada are in agreement as to the location of any additional area, extending easterly along the south shore of Lubicon Lake; Alberta has not opposed this location if the Band is in fact found to be entitled to a larger area for its Reserve.

The question of the membership number to be used as the basis of calculation of the size of the Reserve remains, unfortunately, an area in which little progress towards reconciliation of the conflicting views has been made. The difficulty has been compounded by the refusal of the Band, at least up to this point, to allow the joint genealogical study (which it claims supports the figure of 347 members on the basis of the old Act) to be made available for study at a meeting at which the genealogical experts of the Band and the two Governments would have available both that report and the studies done by Alberta. It had been my hope that such a meeting, and the comparative analysis of the two sets

of studies by the experts of all concerned, would produce some common ground as to a starting figure.

The difficulty is not lessened by Alberta's insistence - at least until this point - that if any membership figure in excess of the 127 agreed to in 1940 is to be used in the request formally put forward by Canada, it will attack that figure even as a starting point for today's solution of the problem. It had been my hope that Alberta would find, in my suggestion that compensation be paid for any excess in area asked for in 1985 over that agreed on in 1940, a reasonable basis for agreeing on the figure of 127 as the minimum starting point for today's discussions, without the need of going with a fine-tooth comb over what could surely be regarded as an accepted historical fact.

It is still my earnest hope that accommodation - or reconciliation of conflicting views - can be found on this basis. I fully appreciate Alberta's concern at being asked today to agree to the transfer of a substantially larger area of land than that agreed to in 1940, which land has a value today far in excess of what was known in 1940, let alone contemplated in 1930 when the undertaking to re-convey lands to enable Canada to meet its treaty obligations to the Indians was first entered into. However there is no question in my mind that Canada's obligation to the Band exists, was recognized in 1940 and that it was then agreed by both Governments that a Reserve based on a membership of 127 would be created at the western end of Lubicon Lake. The matter would have been disposed of, and the Band would be settled thereon and enjoying all the benefits and revenues therefrom if that agreement had been carried out.

The fact that it was not is, on the basis of all the evidence I have seen, entirely the responsibility of Canada. Clearly Alberta remained ready for many years to carry out its obligation under that agreement and the Resources Transfer Agreement, and only changed its position after giving more than adequate notice, in light of Canada's apparent change of intent. In these circumstances, I see it as entirely the fault of Canada that the matter was not disposed of on the

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

basis of the agreement of 1940, and that Alberta is faced today with a request for land in excess of that agreed to then. Hence in my view it is only equitable that Canada should compensate Alberta for the difference, and I have suggested to the representatives of the two Governments that the matter be settled on this basis.

It appears to be equally clear, however, that Canada's obligation to the Band as of today is to provide a Reserve on the basis of today's Band membership. There is ample precedent that the entitlement is as of the time of survey, so that 1986 is the effective date. If this be accepted, it follows that Alberta's obligation under the Transfer Agreement is to re-convey (set aside) that amount of land which will enable Canada to discharge that obligation. If the suggestion I have made be accepted, then the inequity to Alberta occasioned by Canada's non-fulfillment of the earlier agreement will be compensated for. Such compensation should of course be on the basis of today's values. I very much hope that the representatives of the two Governments will find it possible to agree on this as a fundamental basis for the settlement of this particular case.

If this be accepted as a sound base, then it would seem that agreement on the population base should not be such a formidable obstacle. Certain fundamental considerations are suggested in the hope that they will be of help. First, it is traditionally Canada's exclusive responsibility to determine and maintain the register of Indian population, and Band membership lists. Second, it is certainly not in Canada's interest to inflate those figures, having in mind generally the costs of its on-going responsibility to Indian Bands, and particularly in this case if the suggestion be accepted that Canada compensate Alberta for the extra land based on the difference between today's figure and the 1940 figure. Hence it follows that there is a strong case that there should be no attempt to go behind the 1940 figure of 127 members - this particularly so since there is the evidence that Alberta for many years following 1940 accepted and acted on that figure as the basis for the area of land it would have been willing to set aside. Indeed, on the

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

basis of those two fundamental considerations there is a strong case that the figure of 182 members - the Band list of 1985 prior to the new Act - should be accepted as the starting point, and the efforts at reconciliation be confined to figures put forward beyond that. (It should be clear, however, that the figure of 127 would remain as the base for measuring compensation to Alberta for land in excess of that agreed to in 1940.)

There has also been discussion of the matter of the time frame which should be chosen to determine what are the rules to be applied in calculating the numbers eligible to be counted today as Band members for the purpose of fixing the entitlement. Should it be 1930, when the Resources Transfer Agreement was signed? Or 1940, when it was first agreed that the Band should have a Reserve and Alberta agreed to set aside the land for that purpose? Or the present, when Canada and Alberta are again agreed upon the obligation to provide a reserve for the Band but so far unable to agree upon the number or the criteria for determining it?

The problem is, of course, that the criteria for determining Indian status, which bears directly on eligibility and therefore on Band membership, have been changed several times since 1930. Again traditionally, however, it has been the current population figures at the time of survey which have been used to calculate reserve land entitlement. On this basis, it would be the Band membership list established in accordance with the new (1985) Indian Act which would be used to determine the size of the Reserve. My present understanding is that the criteria or rules for determining Indian status, and hence affecting eligibility for Band membership, are not substantially different as between those contained in this Act and those in force in 1940: that what has happened is that restrictive changes were introduced in 1951 but have now been effectively repealed. More precise information and analysis is needed - and is awaited from Canada - on this point. If this be correct, however, there would seem to be no basic inequity to Alberta in applying the 1985 criteria to determine actual membership as the basis of today's entitlement, having in mind in this regard

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

the suggestion that Alberta be compensated for any increase in the validated numbers over the 1940 figure.

I feel I should record at this stage, however, my present feeling that there would be an inequity - almost an impropriety - if the number were to be inflated by the inclusion therein of persons who, while perhaps technically qualified for membership, have not demonstrated a desire to be, or of whom it cannot be demonstrated that in historical fact they ought to be, counted as members of this Band. Thus with respect to persons of whom it is now claimed by the Band that they should be counted, and who may in fact be found to be eligible for membership, but who are now registered as members of other bands or are not, by residence or otherwise, readily identifiable as members of the Lubicon Band community: it seems to me that before they should be included in a membership count for this purpose they should be required to indicate, by declaration or similar method, a definite desire and intention to live as part of the Lubicon Band on the Reserve to be established for them.

As to the method by which the number eligible to be counted for this purpose is to be determined, the Band still refuses authorization for the joint Band-ONC genealogical study and report to be made available for study by experts from Alberta who have carried out studies and made reports on the same matter. I had envisaged that each of those reports would be made available for study and analysis and discussion between both sets of experts, after which I would meet with both groups of experts together and hear and discuss their opinions and conclusions. On this basis, to the extent that I was not able to reconcile their remaining differences, I would have been in a position to reach an informed opinion as to the number to be counted for this purpose and make appropriate comments in this Discussion Paper, which might lead to a further reconciliation.

The Band's withholding of consent still represents a substantial obstacle to direct progress, necessitating a considerable detour. The best alternative route I have been able to lay out and follow so far has been a meeting of the two sets of

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experts at which, lacking authority to refer to specifics in support of particular conclusions, virtually no progress with respect to conclusions or agreement on numbers was possible. We were however finally able to reach agreement resulting in the production of a paper by the two sets of experts, in which each sets forth a summary of the principles and criteria regarded as applicable, and applied, in reaching the conclusion which each believes to be correct. While there are appreciable areas of common approach thus established, there are significant areas of difference.

In the result I am left with the formidable task not only of deciding which principles and criteria are the most acceptable where there are differences, but of applying them myself to the material available in order to reach a conclusion as to the appropriate number to be counted for the purpose of my report - or of further discussion prior thereto. Lacking expertise in this field, this would be for me a very lengthy, and possibly unwise, undertaking. I therefore intend to recommend to the Minister that I be authorized to retain the services of an independent genealogical expert to assist me in this process. I propose that the joint Band-ONC study and the studies prepared by Alberta experts, together with the paper referred to above, and any other material considered relevant, be made available to this expert, and that he be authorized to discuss them with the experts for the parties, all on the same without prejudice and confidential basis that characterizes all submissions and discussions in this Inquiry, and that he then report to me with his analysis and recommendation as to the correct Band membership number to be used for the purpose of calculating the entitlement to reserve.

I must point out also that at this stage I am still awaiting the submission of a definite figure from the representatives of Canada which they consider is the one that should be used as the basis of calculating entitlement. In the absence of such a figure it has really not been possible to carry on very concrete discussions on this question. I should like to receive that figure at an early date, not only because it would be relevant for the discussion lastly referred to, but

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

because it would be essential to further the alternative settlement concept which I now put forward for consideration.

This concept constitutes an alternative approach to the matter of compensation to Alberta for extra land asked for beyond that agreed upon in 1940, which would provide a way around the present impasse created by conflicting views as to strict legal obligations and duties, while not doing any violence to those concepts.

This would be for the parties to agree now that the 1940 figure be accepted as a minimum starting point, but that on the basis of traditional practice that the Band list at time of survey be used as the figure for calculating entitlement, the current actual Band list of 182 be accepted as the actual basis for entitlement. Applying what I have suggested is the equitable principle discussed above, Alberta would then be entitled to compensation for the difference between the area based on 127 and that based on 182. Canada would then offer to purchase from Alberta, and Alberta would agree to sell to Canada, the further amount of land necessary to provide the Reserve for the full number which may be found, or agreed, to be the number entitled to be counted as members of the Band on the basis of the now current criteria for membership. The price per acre or square mile to be paid for this extra land would be the same as that fixed for compensation for the extra land involved in the differential between the area based on the membership figures of 127 and 182 referred to above.

This arrangement has the benefit to Canada and the Band that it provides the Reserve for the full community which the Band claims and which Canada accepts as its obligation to provide. At the same time it recognizes that it would be inequitable either that Alberta should be penalized for the delay in fulfilling the agreement of 1940 (for which Alberta was in no way responsible) or that Alberta should be called upon to bear the entire burden of providing extra land as a matter of legal obligation when the formula for determining the entitlement to that land, and hence the extent of the demand, has been unilaterally changed by Canada by legisla-

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tion at the very time when these discussions were going forward. Neither, however, does it constitute a complete waiver by Canada of Alberta's obligation under the Resources Transfer Agreement to Canada's possible future prejudice, since that obligation would be recognized in Alberta's agreement to transfer the land to fulfill the request based on a present actual membership list of 182 - the traditional obligation - although with compensation based on the unique feature of this situation, the non-fulfillment by Canada of the Agreement of 1940.

For Alberta, the benefits are that it creates no precedent by way of recognition of a legal obligation beyond the traditional one of setting aside land under the Resources Transfer Agreement to the extent determined by current Band lists. And with respect to the possibility that Alberta might be said to have waived a right to require a validated claim, the answer would be that so far as land up to the total based on the figure of 182 is concerned, the figure of 127 was accepted as valid in 1940 and Alberta has been compensated for the difference because of Canada's delay: hence this affords no precedent for dealing with cases where a totally new request is made. Neither could this, nor the request to sell the further land based on the figure in excess of 182, be said to be a precedent for a waiver of the "counted once" rule: for the fact would be that the figure put forward and accepted as the basis for settlement would have been arrived at as the result of a special agreement arrived at on the basis of the particular circumstances of this special case.

Indeed it is difficult to see how a formula, or a method of procedure, for resolving this particular case could in any event be cited or regarded as a precedent in any other case. For the unique features of this case, crying as they do for the implementation of promises made 45 years ago on a basis that will do justice and equity to that community in this day 45 years later, create a unique problem, the solution of which cannot really form a precedent for the solution of any case which only arises for the first time in the future. The representatives of Alberta have in fact taken the position

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in discussion with me that Alberta is as concerned as anyone with the matter of social justice to this community: their understandable concern is that it should not be done, insofar as the actions required exceed Alberta's strictly provable legal obligation, at Alberta's sole cost and expense, especially if that may form a precedent for cases which may arise in future. My belief is that the approach suggested above contains the answer to these concerns.

And of course it is also a fact that the acceptance of this approach will have the advantage to all parties that it will lead to what I believe will be a just and equitable, and relatively speedy, solution to the problem of the Band's entitlement to a reserve which is basic to the whole area of the Band's claims before me in this Inquiry. It is my impression that if such a solution is reached, it will represent a long step towards acommodation and solution of other parts of the claims as well. It is my earnest hope that all concerned will consider this approach with all of the above factors in mind.

As to Third Party interests, the main problem is clearly the agricultural leases held by the Co-op. I can see little profit at this stage in rehearsing the history of membership in that entity, or the question of whether any subtle plot or intent underlay the changes in membership over the years. The historic fact is that the membership which initially included a number of Band members now consists entirely of members of the L'Hirondelle family. But it is also a fact that the L'Hirondelle family have roots in the area going back to at least 1913, and that of late years it has been the members of that family exclusively who have organized and carried on the farming and ranching operation of the Co-op, on which they are largely dependent for their livelihood.

There are thus two conflicting positions or interests - both of them legitimate - which are extremely difficult to reconcile. On the one hand is the position and interest of the Band, who have an unquestioned legitimate claim or right, fulfillment of which was promised to them 45 years ago -

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that is, to have a Reserve at the western end of Lubicon Lake. This includes, of course, the right to carry on agricultural pursuits there, which are in fact of increased and increasing importance to them now that their traditional livelihood from hunting and trapping is so seriously diminished. The continuance in the hands of others of these agricultural leases, located so centrally and strategically as they are, would be a continuing serious and thorny obstacle to the fulfillment of this right.

On the other hand is the position of the L'Hirondelle family, who have been in the area for over 70 years, whose industry and ability in carrying on the operations based on those leases is not questioned, and who have a lawful and legitimate interest as members of the Co-op in maintaining those leases and the livelihood they derive therefrom. Discussions with Mr. Enns, reported to me, do not support the suggestion that the transformation of membership in the Co-op from a situation of full participation by Band members to one of exclusive membership of the L'Hirondelle family was entirely the result of plan or design by that family: rather that it was a combination of circumstances including both the Band's growing opposition to participation in anything which would recognize the right of Alberta to dispose of the land in question - as the granting and continuance of the Co-op leases might suggest - and the continuing activity and interest of Band members in hunting and trapping, which took them away from the scene of the Co-op's activities at crucial times.

The facts are that the positions and interests of both parties in this situation are legitimate but appear to be irreconcilable. In such circumstances the answer to the question of which should yield and which should prevail is generally regarded as depending on the answers to certain other questions or tests. Those are: where lies the precedence or priority in point of time between the conflicting claims or interests? and where lies the balance of convenience and necessity?

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

As to the first, the answer must be in favour of the Band. Its claim to a Reserve as of right was first put forward in 1933, and was recognized and accepted in 1940 as being the 25.4 sq. mi. at the western end of Lubicon Lake. This of course is an interest which is similar in many ways to a fee simple and, while affirmative action was withheld by Canada, neither Canada nor Alberta have ever denied the right, and the claim or interest has never been abandoned or withdrawn by the Band; whereas the interest of the L'Hirondelles is in the continuance of a leasehold interest only which was first granted to the Co-op in 1975, with knowledge of the subsisting claim and interest of the Band. As to convenience and necessity, the balance would again be seen to be in favour of the Band, not only in terms of the numbers of persons interested and affected, but also in terms of continuing hardship and inconvenience if the leases are not terminated.

For while it is true that the loss of physical area could be compensated for by an equivalent enlargement of the boundaries of the Reserve, the fact is that the actual lease areas are, by their size and location, strategically essential to the pursuit of a successful agricultural operation within the Reserve. Their continuance as an alien operation in the centre or heartland of the Reserve would be not only a continuing physical but also a psychological impediment of the sort for which really no compensation can be devised. Whereas the information I have received is that an equivalent area of unoccupied land of comparable quality can be found, and could be made available to the L'Hirondelles, in territory immediately adjacent to what would be the boundaries of the Reserve. Since the Band is prepared to agree to the grant of the 160 acre homestead applied for by the L'Hirondelles (although within the Reserve boundaries) this would mean that that family could carry on its agricultural operations from its home site in an area in reasonable proximity thereto. If this were done, then of course a reasonable time should be given to enable them to effect the transfer.

The question of compensation would also have to be addressed. There is no doubt that the effect of this arrangement would

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be the equivalent of an expropriation, and although it accords with the principles of precedence and balance of convenience and necessity, the application of those principles also invokes the equitable principle of compensation to minimize, so far as possible, the hurt resulting to the party called upon to make the surrender of its interests. The measure of the damages includes not only the value of the interest thus surrendered, but also the cost of placing that party as nearly as possible in the equivalent position to that which he enjoyed before the taking. That would include, in this case, any actual cost of transfer plus the cost of breaking the soil, fencing, etc., to put the new holding in an equivalent position to that of the old, and also any loss of income received or extra expense incurred (purchase of feed, etc.) during such period as may be required to bring the new land into production. These last two items could perhaps be eliminated, or reduced, if the L'Hirondelles were allowed the continued use of the present lease areas during the time required to do that.

There might also be a question with regard to access. If the L'Hirondelles are to continue to live where they do now, or if the base of operation is the 160 acre homestead under application (which will be within the boundaries of the Reserve) then it is to be anticipated that access will be required for the movement of both equipment and cattle between that location and the new lease area. This should not be a major problem, but it is one which should be addressed in the course of discussions which may follow.

I recommend accordingly that Mr. L'Hirondelle or his representative and the representatives of Canada and Alberta meet with me to consider the acceptance in principle, and discuss the application, of a solution to this problem along the lines outlined above. If it be so accepted, I would suggest that Mr. L'Hirondelle and representatives of Alberta meet as soon as may be thereafter to agree on the area which Alberta would make available by way of lease or leases to replace the existing leases. While I recognize that it has not yet been settled that the area of the Reserve will exceed the 25.4 sq. mi. previously agreed on, I recommend most strongly that

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Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

the area considered for this purpose not include any area which would be within the boundaries of that Reserve as it would be if extended easterly along the south shore of Lubicon Lake. Thereafter there should be further meetings to be arranged to work out the details to be embodied in my Report recommending the arrangements thus arrived at as the agreed course of action to settle this aspect of the Band's claims.

As to whose is to be the responsibility for payment of compensation on the basis discussed above, it appears to me clear in principle that Canada should bear at least the major portion of the cost, since Canada's is the main responsibility for the fact that the problem exists. Had Canada carried out its part of the agreement of 1940 within a reasonable time, the Reserve would have been established and this situation could not have arisen. This subject, however, including any considerations put forward which may suggest modification of this approach, will be fully covered in that portion of this Discussion Paper dealing specifically with the claim for compensation in all its aspects. What is important now is to explore actively the prospect of acceptance in principle of this suggestion for an equitable disposition of the matter in which the positions of the two parties most concerned have so far been irreconcilably opposed.

The Band is prepared, with some reluctance, to accept existing interests of Oil and Gas companies, including existing rights of access thereto, as these can be accomodated within the occupancy and use the Band would make of its Reserve. They do not wish, however, to be taken as agreeing in advance to any expansion of actual surface holdings or installations, even if provided for in terms of existing leases: they feel these should be a matter for consultation at the least. It is of course also noted and expected that lease and royalty payments therefor will accrue to the government of Canada for the benefit of the Band after the Reserve is set up.

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS

Band's Position

The transfer by Alberta of the lands constituting the Reserve should convey full subsurface rights, including oil and gas. This should apply not only to the 25.4 sq. mi. agreed on in 1940, but also to such additional area as is to be included in the Reserve. It is not to be contemplated that the area set aside for the use and occupancy of the Band as its Reserve should consist of two classes of land - land with full mineral rights including oil and gas, and land without such rights. The Band is prepared to accept that the transfer of lands for its Reserve should recognize and protect existing interests of oil and gas companies therein, provided however that such interests are thereafter to be subject to the relevant provisions of the Indian Act and the Indian Oil and Gas Act so that the royalties, etc., shall be paid to Canada for the benefit of the Band. The details, including such matters as the necessary surrender by the Band to bring the lands within the operation of the relevant provisions of those Acts, have not been discussed and will require to be settled prior to transfer.

Position of Canada

Canada supports the Band's position, and I am not aware of any differences between them on this subject.

Position of Alberta

Alberta appears ready to agree that the transfer of the 25.4 sq. mi. area should include full mineral rights (subject to protection of existing interests therein) but has not shown such readiness with respect to any area beyond that. In discussion of mineral rights with respect to the 25.4 sq. mi., the expression used was that Alberta agrees in principle, on the basis that what would take place insofar as mineral rights are concerned would be "simply a change in landlords, with the new landlord respecting existing rights." There is no conflict between this position and the positions of the Band and of Canada.

With respect to any additional area, however, the position is not so clear. At our second meeting, when the matter of a possible approach to agreement on setting aside an addi-

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS
Position of Alberta (cont'd.)

tional area was under discussion, it appeared that Alberta might consider the possibility of agreeing to a Reserve area on the basis of a membership figure of 182 (with compensation for the difference between that and the area based on 127) but that while Alberta may also be prepared to consider setting aside an area in excess of that on grounds of social justice, etc., this would be by way of a "land purchase", and that additional area would not have the status of "a full Indian Reserve". This of course closely parallels the suggestion made above as to the approach to resolve the differences as to the surface area to be included in the Reserve, although that suggestion does not contemplate different types of holdings. The matter was not elaborated at the meeting in question, but there may well be an inference that what Alberta so far contemplates is that mineral rights not be included with any area in excess of that based on a membership of 182.

Third Party Interests

The oil and gas companies expect that their rights to oil and gas under whatever lands may finally constitute the Reserve, including their rights to extract the same, be fully recognized and protected and be continued after the transfer to the same extent as they presently exist. There is no conflict between this position and that of the Band or of either government.

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears that there is positive agreement on the inclusion of subsurface rights with respect to the area of 25.4 sq. mi., and probable agreement with respect to the whole area based on membership of 182, but that possibly Alberta does not yet agree to the inclusion of such rights in the transfer of any area beyond that.

As to reconciliation of this conflict - if there be one - I venture to suggest that the considerations in support of the position of the Band and of Canada outweigh those in support of the position of Alberta, and should be accepted. There

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS
Remarks - Including Areas of Possible
Reconciliation or Accommodation (cont'd.)

is of course the consideration based on precedent. I do not suggest that this is conclusive, for we are not discussing here a rigid or legalistic approach but rather one based on goodwill and a desire to resolve conflicts while doing what is equitable in the circumstances: but considerable weight must surely be attributed - even in this context - to the fact that historically the lands set aside as Reserves for the benefit of Indians in the Treaty areas have never excluded, but always included, full mineral rights. It would surely put the Lubicon Lake Band in an anomalous position if it were to be the only one which had that resource excluded from a portion of the Reserve set aside for its use and benefit.

In the area of justice and equity, from the point of view of the Band there is the consideration that the entire area of the Reserve will be their homeland. If full subsurface rights are included the Band will have, as is desirable, control over what further rights for oil and gas exploration and development will be allowed thereon, for although the title would be vested in Canada such rights could only be granted with the Band's consent through the surrender process. But if subsurface rights are not included in the portion under discussion then the Band will not have any control over those matters with respect to that portion of its homeland - and it will be an appreciable portion of the whole. Or, at the very least, even if it be accepted that some consultative process be established, there would be divided jurisdiction which would be both a continuing and cumbersome inconvenience and incompatible with the whole concept of control by the Band over what takes place on its homeland. Added to which, of course, would be the loss of the right to the benefit of royalty revenues derived from such development, which would belong to the party retaining title.

From the point of view of equity to Alberta, there would be nothing inconsistent or anomalous in Alberta's relinquishing jurisdiction over subsurface rights here as compared to the situation with respect to lands set apart for the use and occupancy of Indians as their Reserve in any other case. And although it is suggested that the portion of land in

Claim - 2. SUBSURFACE RIGHTS WITH RESERVE LANDS
Remarks - Including Areas of Possible
Reconciliation or Accommodation (cont'd.)

question be purchased as a compromise solution to the conflict with respect to strict legal rights and obligations, it is still surely not to be regarded as anything other than part of the area necessary to provide a Reserve to meet the recognized and legitimate needs of the Band. There would appear, then, to be no inherent violation of propriety or precedent with respect to jurisdiction if this transfer is also accompanied by full subsurface rights.

As to the other equitable consideration from Alberta's point of view - the loss of lease and royalty revenue - this is taken care of by the proposal that there be compensation by way of an agreement to purchase that portion of the Reserve which exceeds the area based on a membership figure of 182. The value of the land, whether for the purpose of compensation or of purchase price, would of course be fixed having regard to its potential for oil and gas production, so that Alberta would not suffer economically from inclusion of subsurface rights in the transfer of this portion.

There is however one modification in Alberta's favour which might be considered and found acceptable: that is the suggestion that Alberta be paid a portion (50% was the figure mentioned) of any lease and royalty revenues actually derived from this excess portion after the date of transfer. (If this were agreed, presumably there would be a proportionate reduction in the purchase price to be paid). The rationale behind this compromise would be recognition of the special nature of the settlement of which it would be a part: that is, a formula to assist the parties in coming to overall agreement on how to deal with a situation with respect to parts of which it is difficult or impossible to reach agreement in detail. It is not unusual for parties to adopt such compromises which afford a route around what is otherwise an impasse. It is my hope that consideration of these various suggestions may provide a means of reaching mutual accommodation.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position

The Band asks, with respect to its traditional hunting and trapping area, that there be set up a wildlife management and environmental protection program in which they would have active participation and an effective voice. The object would be to ensure that the development and operation of oil and gas extraction are carried on with due regard for the Band's interests and rights with respect to the maintenance of wildlife in the area from which traditionally they have derived their livelihood, and not in virtual disregard thereof which they feel has been the case to date.

The Band rests its claim with respect to wildlife and environmental management rights on the same basis as all other claims - i.e. unextinguished Native Title. Hence it claims the right to control these matters in its traditional lands. Thus the Band envisages a new program which would combine support for those members who continue to pursue the traditional means of livelihood but find their income reduced as a result of development, with the exercise by the Band of control of such activities in its traditional area - a Trappers Support Program, rather than a Trappers Compensation Program.

It is not the Band's position that oil and gas development and extraction must cease, for they believe that rehabilitation and maintenance of wildlife to support a considerable trapping and hunting livelihood, and continuance of oil and gas operations, are compatible provided that the latter are planned and carried out with due regard for the former. Nor is it their position that the continuance of their hunting and trapping activities as the exclusive or main source of their livelihood would be required in perpetuity, for they recognize that future generations may well come to follow other lifestyles and occupations as they become increasingly aware thereof and receive the education and training necessary to enable them to do so. Rather their position is that they are entitled to have the basis of their traditional lifestyle and livelihood maintained so that such of their members as presently know no other may continue to follow it, and so that future generations of members may have a choice as to whether to follow it, rather than being bulldozed, as it were, into another lifestyle.

The Band accordingly asks for a commitment that there will be established a management program which

(a) recognizes and is based on the principle that the resources of the area will be so managed that development of the oil and gas - or any other particular resource - will be allowed to proceed only in a manner consistent with the continued

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

existence of sufficient stocks of wildlife as required to support the continuing rights and needs of the Band in respect of that resource;

(b) gives effect thereto by providing for the setting up of a management authority to administer the program so constituted that the Band will have an effective voice in making decisions which will ensure that this objective is maintained, including decisions governing such matters as the setting of levels at which stocks are to be maintained, the setting of limits and determination of persons who are to be permitted to hunt and trap in the area, and the resolution of conflicts between the maintenance of the desired level of wildlife and the activities or proposed activities of those engaged in the development and exploitation of other resources in the area.

Spokesmen for the Band have stated that they accept the necessity for self-discipline and are ready to be bound by limits applicable to themselves as well as others in order to achieve and maintain the fair and continuing balance of interests envisaged in this program. Thus they envisage specifically the probable necessity, in light of the low levels to which development has presently reduced wildlife in the area, of cutting back the numbers of furbearing animals to be taken by trapping for some years, until stocks are restored. It is their stated desire that the program should be set up and operated not in such a way as to disregard or submerge the interests of developers entirely in favour of those of the Band but rather so that, a balance between them having been set out in principle, the voice of the Band will be heard and will prevail in the resolution of differences, after discussion, as to how that balance should be applied and maintained.

The Band wants also, however, specifically to have that effective voice in the determination of such matters as what game management programs are to be initiated. For instance, they doubt whether the moose population could in fact be rehabilitated and maintained at a substantial or meaningful

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

level in the face of continuing active development and operation of oil and gas installations in this formerly wilderness area, but they believe there is an alternative species of big game animal which is not so sensitive to such activities and which could be introduced and, if an appropriate game farm program were developed, could be brought up to and maintained at a sufficiently high population level to provide once again a substantial portion of their livelihood, both as food and as hides for sale, as the moose formerly did. They envisage that they would have an effective voice and part in the introduction and operation of such particular management programs.

As to the interests of others in hunting and trapping in that area, the Band does not claim exclusive rights or privileges. Although they claim that theirs has historically always been, and still is, the predominant use of the area for these purposes, they recognize that other native peoples have carried on the same activities, though to a lesser degree, in some parts of the area. They are prepared to accept the continued exercise of such rights, and to speak and act for their protection and continuance in their role as participants in the design and implementation of the management program.

With respect to administration insofar as trapping is concerned, the Band asks that it have authority to determine which Band members are to have trapline licences. They also want it to be clear that the program be administered on the basis that if there is conflict, in the matter of granting trapping and hunting permits, between the native and non-native people, the conflict be resolved in favour of native applicants. They put this on the basis of the priority which is due to their interests in hunting and trapping in their traditional area which, they say, is the same whether the claim be founded on native title or on the guarantee in the treaty.

Without prejudice to the question of jurisdiction, or to its assertion that it has the right to a program which gives it control of these matters on the basis of continuing Native Title (or in the alternative on the basis of the Treaty provision) the Band is prepared to discuss with Alberta the

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Band's Position (cont'd.)

setting up of a joint Band-provincial program which will reflect and give effect to these objectives. It is emphasized, however, that there would have to be incorporated, in a joint or any other program, provisions which reflect the fact that support for the continued existence of trapping and hunting as a way of life and not merely compensation for losses resulting from unrestricted development activity is the governing principle of the program, and that the right of the Band to an effective voice in the determination of specific policies and in the resolution of disputes thereunder is a key element in the administration of the program. The Band emphasizes that it does not conceive this as a welfare program applicable to its members generally, but as a program designed to support and make possible the continued activities of those who do engage in and rely on that lifestyle as their livelihood.

The Band's basic position remains, whatever be the precise course of discussion or vehicle chosen to implement its rights, that by virtue of its continuing aboriginal title or on the alternative basis of the rights guaranteed to Indians in the Treaty, supported in either case by the guarantee now found in the Constitution, it has the right to protect and manage the wildlife in its traditional area and to a program, whether solely based on these foundations or erected in co-operation with the Province, which gives it the control and protection of its way of life.

Position of Canada

Representatives of Canada have not yet taken any position in detail, but have stated that they would support the Band in consultations with Alberta to ensure protection of the Band's interests and rights in respect of hunting and trapping in its traditional area, with Band involvement in a management program which recognizes and safeguards those interests.

Position of Alberta

Alberta does not accept that it has any specific obligation to the Band in this connection beyond what it owes to all

Albertans with respect to the management of resources and the protection of wildlife. Nevertheless Alberta does not deny the historic interest of the Band in hunting and trapping in this area, and its special concern for the restoration and preservation of wildlife stocks. Accordingly, Alberta is prepared to consider and discuss the setting up of a model management program which would take account of these concerns, with Band participation therein, provided that the Band is prepared to accept the need for and exercise self-discipline in this field and to respect the legitimate interests of others.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Position of Alberta (cont'd.)

In response to the observation that the Band has declared itself ready to do this, but wishes the program to be so shaped and managed that they will have an effective voice in the protection of their rights, the position of Alberta was somewhat guarded. Nevertheless, although paramountcy of the Band's interests was not conceded, Alberta's spokesman repeated that Alberta is prepared to consider the Band's suggestions and work actively towards the establishment of a model management program.

Alberta emphasized, however, that a necessary pre-requisite to success in this area is a climate for discussion based on evidence of goodwill and a desire to co-operate on both sides, and expressed the hope that such a climate will be created and prevail so that fruitful discussions may be carried on in this and other areas.

Third Party Interests

I have met with representatives of eight of the Oil and Gas companies operating in the area - believed to be a reasonably representative group of those concerned. With one exception, they indicated agreement in principle with the general concept of a management program as outlined, with the Band having an effective voice in its operation, but expressed a desire to take part in discussions of the details before committing themselves further. The one exception was to the effect that more information as to the content and actual method of operation of such a program would be required before any position could be indicated. Several of those taking part expressed concern, however, that care should be taken that such a program be so designed and implemented that it does not constitute just another bureaucracy increasing costs and delays in obtaining access.

In general, the outcome was a positive reaction to the concept and to Alberta's position regarding a "model management program", and a desire to take part in discussions giving them an "opportunity for input" in the formative stages.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation

Clearly there are grounds to believe that a mutually acceptable solution to this problem will be achieved. The basis is there in the readiness of the Band on the one hand to recognize the interests of others, to accept self-discipline in the attainment of the objective of rebuilding and maintenance of stocks of wildlife, to accept that there must be a balance between their rights in respect of that resource and the rights of others in respect of other resources and, in their role in the management of the program, to act as protector of other native interests in the wildlife resource as well as of their own interests therein. It is there in the readiness of Alberta - indeed the desire, as I appreciate it - not only to accept in principle the desirability of a model wildlife management and environmental protection program which recognizes the interests of the Band and accepts that there must be a balance between the preservation and exercise of those interests and the exercise of other interests, but also in the readiness to enter into active discussion of the establishment of such a program in a manner which will give the Band an effective voice in its implementation. It is also particularly encouraging to note that the representatives of the oil companies with whom the matter was discussed were prepared, with one exception, to indicate acceptance in principle of the concept of a management program which would recognize and protect the rights of the Band in maintaining the wildlife population, and expressed an interest in participating in discussions of the content and implementation of such a program. Their concern, however, to avoid adding appreciably to the burden of regulatory authority and time taken to deal therewith is understandable, and should surely be borne in mind in working out the details.

It would not be realistic, however, to disregard an issue which must be faced and worked out in the course of discussion. That is, what I will call the question of paramountcy: where there is conflict, whose interest, and whose voice, is to be given the paramount consideration? As I appreciate it, this problem arises not with respect to the general principle on which the program itself is to be based, and which it would reflect, but rather with respect to its application or administration.

Claim - 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

For basic to the concept of the program itself, as it has so far been developed in my discussions with the parties, is the principle that there be a fair balance between the interests of the Band in the continuance of wildlife including its right to take and use that resource, and the rights and interests of others, such as oil and gas companies, in developing and extracting other resources. It is anticipated that this principle would be contained or reflected in whatever legislation and/or regulations are enacted as the embodiment of the program itself. Thus far, this should not present any difficulty in principle - only in drafting. But it is in the implementation or administration of the program in accordance with that principle that the practical difficulties will arise.

Thus, if a conflict should arise between the proposed location of an access road as desired by an oil company which has, or seeks, authority to construct such a road, and the location of a trap line which a member of the Band has a permit to lay and operate: if one could be moved or altered without rendering the operation in question impossible or impractical, while to move or alter the other would have that result, then the implementation of the fair balance principle would indicate that the management authority should resolve the conflict in favour of the latter. Reasonable notice, and time to make the alteration, would, of course, be expected.

But if the conflict should appear to be irreconcilable or insoluble by the application of that principle, then the question of paramountcy arises. Thus if, for instance, a developer should wish to locate an installation in a certain area as vital to the effective operation of its overall development plans but it should happen that to locate it there would have the effect, perhaps by denying a breeding ground, of a massive reduction in the wildlife population: two vital interests are at stake and the problem cannot be resolved by the application of "fair balance", so the question is, whose interest is to be regarded as paramount? The Band asks that the program be so framed as to provide that the protection of its interest be the paramount consideration in the resolution of such conflicts, and that the management or

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

other authority administering the program, in which it would have an effective voice, be directed to resolve the conflict on that basis.

On the face of it, it may appear that the Band is reaching too far in asking that the program incorporate this approach. But it is fair to ask: would the program have any real meaning or benefit for them on the basis of any other approach? The wildlife resource is the vulnerable one: if it is not protected, it ceases to exist, and with it goes the whole lifestyle and living which depend upon it. It is the continuation of wildlife which is threatened by development, not development which is threatened to the point of extinction by continuation of wildlife. There must be very few, if any, situations where development cannot be effectively continued notwithstanding the necessity of modification of a particular program or alteration of a particular location: plans for such can be made and modified, for they are under human control. But there will be cases where the implementation of such plans, if not altered, will disrupt and severely diminish, if not extinguish, the wildlife, or effectively drive it away, and that result - if that particular development is allowed - cannot be altered, for the pattern of wildlife reaction to such situations is not under human control.

Given the recognition of the Band's interest in the wildlife resource, then, it can be argued that it follows as a fact - certainly as a matter of logic - that where there is an irreconcilable conflict between that interest and the interest of developers which cannot be solved by the application of the fair balance principle, there must be acceptance of the paramountcy of the Band's interests as the guide to the outcome.

Another factor to be weighed in this connection is the Band's position that it is not necessarily asking for this in perpetuity: that there may well come a time when its members no longer wish to follow the lifestyle that depends on the maintenance and exploitation of the wildlife resource in the traditional area. But there is a large number of

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

members who presently do not know, and have not the training and ability to follow, any other. What is asked for is a program that will ensure to the Band the ability to maintain that resource at least for so long as there is an appreciable number of its members who are dependent upon it for their way of life.

An appreciation of the Band's position also requires a reference to the Treaty. True, the Band does not rest its claims upon Treaty entitlement, but on a wider basis including unextinguished native title: but both governments deny the latter, and have so far maintained that the Band's claims must be measured on the basis of treaty entitlement alone. Accepting this for the purpose of this discussion, it must be observed that the Treaty which gives to the Indians concerned the right to continue their usual vocations of hunting, trapping and fishing throughout their traditional lands, provides that this right is subject to only two exceptions or limitations. The first is, that it must be exercised "subject to such regulations as may from time to time be made by the Government of the country...", now the Government of Alberta. The Band's contention here is that this does not confer the right on any government, including the Province, to adopt laws, regulations or policies which extinguish the right guaranteed by the Treaty - rather by necessary intendment the reference is to regulations which are consistent with the recognition and continued exercise of that right. In this context it is noted that the Treaty Commissioners themselves emphasized that the Indians raised the question of the coninuation of this right, and signed the Treaty only on receipt of "solemn assurances" that they would "be as free to hunt and fish as they would be if they never entered into it."

The other exception is that those rights may be pursued throughout the entire area "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, ... or other purposes". The intent that Alberta should give effect to the rights thereby granted, and the limits of this restriction thereon, are reflected in s.12 of the Resource Transfer Agreement which provides that

"In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence" the game laws in force in the Province shall apply to Indians therein, and goes on specifically to provide "that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing for game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access".

Claim- 3. WILDLIFE MANAGEMENT AND ENVIRONMENTAL PROTECTION PROGRAMS

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

In the light of the clear intent and acceptance by both governments of the implications of that interest - that is, that the Indians should have the continuing right to hunt and trap in their traditional area - it would be difficult to conclude that by the mere granting of concessions to prospect for oil and gas in that area, and to develop those resources when they may be found, the Province has terminated or abrogated - or had the intent to do so - the rights of the Indians to pursue their usual vocations of hunting and trapping in this territory, vast spaces of which are not "occupied" in any meaningful sense of that word. It would surely take a very clear expression or indication of intent to do so. And if the Indians have a continuing right to hunt and trap there, then surely they have a continuing and pressing interest in the maintenance of the resource - the wildlife - without which that right becomes a mockery.

These facts and factors, including my conception of the problem area remaining to be resolved, are set out not so as to pre-empt discussion, but rather with the hope that they will provide a helpful background or climate for further discussion and resolution of the problem. I emphasize again that the positions and attitudes of all parties to this matter in discussions to date have been such as to encourage the hope that further discussions within the parameters outlined will enable me to report that there is in fact agreement that there should be such a program and on the basic principles which it should reflect and in accordance with which it should be administered.

Finally in this respect I can only concur in the feeling expressed by Alberta that a favourable climate for such discussion is essential. This can only be created by evidence of goodwill and readiness to co-operate, which includes a readiness on both sides to appreciate and understand the concerns and views of others. It also involves, and I urge equally upon both sides to accept, a readiness to exercise self-restraint and refrain from administrative acts and public statements which destroy the climate and diminish the likelihood of fruitful discussions in respect of this and all other issues.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Band's Position

With respect to natural resources development activity carried on by various enterprises within the Band's traditional hunting and trapping area located generally north of Lubicon Lake, the Band proposes that such enterprises adhere to a program which would

(a) provide notification to the Band of employment opportunities available with those enterprises in order to allow Band members to apply for that employment; and

(b) give preference for such employment to Band applicants.

Such a program would include training programs conducted by the employer where practical in order that Band members could gain employment and experience in the natural resources development industry.

The Band intends by this program to develop alternatives to the traditional hunting and trapping economy of that community. Hitherto, the Lubicon Lake Band has received little, if any, timely notification regarding employment opportunities created by natural resources development within the Band's traditional hunting and trapping area. The Band seeks to rectify this situation and make provision for employment opportunities for those who have a close historical and social nexus to the area in which the development employment opportunities arise. The Band states that where its member applicants are not qualified for specific available employment, or are unavailable to offer their work services for positions of employment, development enterprises should then of course look to alternative sources for employees for those positions.

Position of Canada

Although this is seen as basically an area of provincial jurisdiction and responsibility, neverthless Canada generally encourages priority in employment where practical for native peoples. Canada would use its good offices to assist all concerned in working out and implementing a program of this nature.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Position of Alberta

Alberta feels that this matter does not fall specifically within rights recognized as belonging to native peoples in the Treaty 8 area, but has indicated a readiness to work with the Band and with natural resources development entities towards meeting the Band's desires in this matter so far as reason and practicality will allow. In this context the view was expressed that "...the James Bay model is an excellent one".

Third Party Interests

Representatives of the eight Oil and Gas companies with whom I have met indicated that they are not averse to providing notice of employment opportunities to native peoples living in the area of development activity. Nor are they averse to employing those local individuals who are interested in obtaining and maintaining employment in their operations. Some of the representatives with whom I met indicated that they have to varying degrees in the past instituted training programs for, and have employed, native peoples residing in development activity areas, and that, indeed, it was cost-efficient to the employer to be able to find a willing and steady source of local workers.

The companies indicated, however, two concerns in this regard. The first is a concern that additional governmental and regulatory body control would entail more "red tape" in respect of their operations. The second concern arises out of some of the companies' experiences wherein local native workers have failed to retain interest in maintaining the employment which had been made available to them. It is acknowledged by the companies with which I have met, however, that there have been several examples of successful and effective employment liaisons with local native peoples and that the companies had not had specific contact with the members of the Lubicon Lake Band.

With respect to implementation of a program of notification to, and priority in hiring of, Band members and other local residents, it was pointed out that the majority of employee hirings for natural resources development is done by sub-contractors of the companies holding interests in the Band's traditional area, not directly by the companies themselves.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING
Third Party Interests (cont'd.)

The representatives with whom I spoke indicated that a program such as is proposed would need the active involvement of those sub-contractors. Some of the companies do, however, stipulate in their contract-bid documents that such sub-contractors must endeavour to hire locally (although it was not specifically stated that such a stipulation is expressly directed to the hiring of Indian or native peoples). The companies themselves would wish to avoid any direct responsibility for the hiring practices of such sub-contractors.

A very real problem is said to exist in that the Alberta Individual Rights Protection Act has been so construed and applied, according to the information given to me, as to prevent a preference in employment being given to a particular group on grounds that this would be a discrimination against others. It was also stated, however, that the Government has power to designate areas in which the operation of this Act may be suspended.

In this respect, however, I have since been referred to recent case law including particularly the case of Athabaska Tribal Council v Amoco Canada Petroleum Company Ltd. et al (S.C.C.) [1981] 6 W.W.R. 342. It appears that this may well dispose of the concern with regard to the application or effect of that legislation in this context.

In general, the representatives of the companies with whom I met indicated agreement in principle to the introduction of a mechanism whereby timely notification of available job opportunitites would be given to the Band and, to the extent necessary and practicable, some training programs made available to qualify its members for employment in those positions. The matter of giving preference in employment to Band members with respect to available work in its traditional area for which they are qualified was not opposed in principle, but the extent to which this can and should be done would be dependent on discussions with Alberta for approval and for resolution of legal problems, if any, posed by the Individual Rights Protection Act. The company representatives expressed a willingness to meet with representatives of the Band and of Alberta to discuss the matter in an endeavour to work out practical and acceptable proposals.

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation

The Band's proposals regarding this matter are directed at securing reasonable notification of and preference in filling employment opportunities within its traditional hunting and trapping area. It was made clear that the Band would not expect this to apply immediately to jobs requiring a high degree of technical skill or knowledge, but would expect that the program include provision for technical training so that Band members may qualify for at least reasonably skilled work. There are, however, many types of work such as clearing and developing sites, and maintenance work, for which Band members are qualified now or could be with a reasonable degree of on-the-job training and supervision. It is felt that the program could and should be implemented immediately with respect to this type of employment opportunity.

The Oil and Gas company interests with whose representatives I have met have indicated their general interest in hiring local residents who are interested in the employment offered. As employers they seek to maintain in the long term an efficient operation and welcome the opportunity to utilize workers who reside near, and have knowledge of, the area in which the natural resources development activity exists.

Alberta has shown an encouraging response and apparent readiness to consider practical measures to make such a program a reality.

Representatives of Canada have until now gone only so far as offering their good offices to promote the active working out of such a program, which they regard as primarily within Alberta's jurisdiction. It is to be hoped, however, that Canada would be prepared to consider some direct responsibility, or at least a supporting role, in the matter of technical or job training programs in the light of its jurisdiction in matters pertaining to the education of Indians.

On the basis of the foregoing positions and expectations I believe it is reasonable to anticipate the active collaboration of all concerned in working out a program which will provide for timely notification to the Band of opportunities for employment in resource development activities in the Band's traditional living and hunting area, establish training

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation
(cont'd.)

programs to assist Band members in becoming qualified for positions within their potential, and give preference in employment to Band members in such positions as they are now or may by such training become qualified to fulfill.

The justification for the preference is of course based, in principle if not in law, on the Band's traditional identification with and interest in this area, and on the fact that as development takes place therein, it is bound to affect their traditional lifestyle and source of livelihood and that they are accordingly entitled to expect first consideration in employment in that new development which has diminished their ability to rely upon the old methods. Although there have been some reservations I have heard, in the course of my discussions, no objection in principle to this concept of reasonable preference. It must be recognized, of course, that there are legal and constitutional limits in the area of preference in employment, which will be for consideration by Alberta in respect to the application or modification of its Individual Rights Protection Act, but I have a strong feeling, on the basis of the positions taken in discussions to date, that there is ground for hope that the these problems will be resolved and that an acceptable program can be worked out.

Since there was reference in this context to the James Bay Agreement as being an excellent model for such a program (although the reservations expressed by Alberta to the applicability of that model in other contexts are noted) it may be appropriate to touch briefly on its provisions here. Sections 28.8 through 28.10 of that Agreement make provision for training programs for the Cree Indians concerned, and provide clearly for priority to be given to those Indians in notification of employment opportunities and fulfillment of positions throughout the territory in question. Although the emphasis is initially on employment in government services or government-initiated projects, the concluding portion of s.28.10 provides as follows:

> 28.10.4 Quebec and Canada shall take all reasonable measures, including but not limited to regulations, to establish priority to available and duly qualified local persons or entrepreneurs in respect to contracts and

Claim - 4. EMPLOYMENT OPPORTUNITIES AND JOB TRAINING

Remarks - Including Areas of Possible Reconciliation or Accommodation
(cont'd.)

employment created by development in the Territory.

There would seem to be no reason why the same approach should not be taken in working out and implementing a program to give priority to the Band with respect to opportunities created by development in its traditional area. The Band feels that once it is settled and organized on its Reserve, and the program is in place, it should be in a position not only to take advantage of employment opportunities for individuals, but to tender on some of the contracts for development as well. This objective should be kept in mind in the discussions which follow.

It is not inappropriate to emphasize here that not only the working out of such an employment opportunities program but also its implementation in practice will call for both mutual understanding and co-operation and for acceptance by both sides of the responsibilities which are peculiar to this situation. Thus, with respect to employment, the success of the program will rest upon both parties to see that the practical requirements of the employer are met by the employee and that the employing party recognize the lack of experience and exposure of Band members to the regimented demands of the daily work schedule. Three ingredients are necessary here: (1) a mechanism for notification to, and an application by, members of the Band regarding employment opportunities; (2) an organizational structure within the Band to marshall those Band members interested in such employment; and (3) the maintenance of interest on the part of Band members in an employment and training program which parallels the willingness shown by governments and developers in providing that program.

On the basis of all the foregoing, I anticipate being able to report, following the next round of discussions, that there is positive agreement on the matter of an Employment Opportunities and Job Training Program, and that representatives of the Band, the two governments, and the developers will be meeting to work out its provisions and implementation.

CLAIMS FOR COMPENSATION

General

The Band's claim for compensation as contained in the "Points For Discussion" document referred to at the outset of this Paper is very generally stated. As the matter has developed in my discussions to date, however, it appears that there are two main categories of claim under this head: compensation for damages or losses incurred to date, and compensation for anticipated future damage or loss. The claim in each category actually covers a variety of distinct areas or heads of claim. For convenience, and to ensure that all aspects of this claim are in fact considered, I have divided each category accordingly into separate sub-heads. This organizational approach is reflected in what follows.

The Band now emphasizes that its claims here, including the claim for lost oil and gas revenues from both the Reserve area and the traditional lands, are based on contiuing aboriginal right and title. On this basis it is stated that the claims would include not only lost lease and royalty revenues, but also the acutal value of the resources extracted from their lands without their consent. Unfortunately, this aspect of the claims was not made clear to me, or at any rate was not perceived by me in the various earlier meetings I had with the Band and its representatives, so that it was not raised by me in discussion with other parties. Nor of course is it reflected in the following portions of the Discussion Paper which deal with the claims with respect to Oil and Gas Revenues.

Since this aspect of the claims was not discussed earlier, it is not possible to do more now than to record the fact of the Band's position with regard thereto and to ask all concerned to note it for future discussion. I do not consider, however, that it alters the statement or discussion of the Band's claims with respect to the lease and royalty component of oil and gas revenues, and those portions of the Discussion Paper accordingly stand basically unaltered, although with textual amendments as noted immediately hereunder to reflect specific modifications which the Band feels should be made so as more accurately to set out its position in detail.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(i) Oil and Gas Revenues

Band's Position

The Band claims compensation for lease and royalty revenues derived from the exploration for and development of oil and gas on the approximately 25.4 square miles proposed as its Reserve in 1940. Without prejudice to its claims based on native title, the Band points to the facts that in 1940 it was agreed that this area should be its Reserve, that both Canada and Alberta took certain steps to secure this Reserve pursuant to that agreement, and that had it not been for Canada's failure to carry out its further obligations under that agreement the Band would long since have been settled on that area and enjoyed the benefits and revenues derived therefrom.

On this basis, and as an additional or alternative ground to that based on Native Title, the Band claims compensation for the loss of all oil and gas rentals and royalties which have accrued with respect to those lands since the commencement of exploration and development. The quantum of this claim is submitted accordingly as the entire amount of such revenues as have in fact been received by Alberta with respect to these lands, together with interest thereon from the respective dates of receipt.

As to which government is liable to compensate it, the Band's claim is directed primarily against Canada, notwithstanding that Alberta has in fact received those revenues. This is on the basis first, that Alberta was ready for many years to implement the agreement of 1940 and transfer that land, including mineral rights, and that the responsibility for the fact that the agreement was not implemented is entirely that of Canada; and second, that it was known to Canada throughout that the Band attached great importance to the securing of the mineral rights with the land, so that the loss to the Band of the benefit of those revenues was a foreseeable consequence of Canada's failure to implement the agreement. It is of course a matter of indifference to the

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(i) Oil and Gas Revenues

Band's Position (cont'd.)

Band which government actually pays the compensation, but it regards Canada as having the direct liability to it therefor for the reasons stated.

Position of Canada

What will be the final position of the government of Canada is not known at the time of writing, but the Hon. Mr. Crombie has accepted my recommendation for the payment of an interim advance on account of compensation on the basis of the Band's claim which has been summarized above. He has prepared a submission accordingly which he has presently under advisement with his Cabinet colleagues.

Position of Alberta

Alberta does not accept any responsibility for non-fulfillment of the agreement of 1940, and does not accept liability to compensate the Band for revenues received from these lands, whether under the claim based on Native title or on any other basis.

Remarks - Including Areas of Possible Reconciliation or Accommodation

On the basis of all the evidence that the Band would have been settled on this area as its Reserve long ago and enjoyed the benefit of all revenues therefrom but for Canada's failure to fulfill its part of the agreement of 1940, and bearing in mind particularly that Canada today agrees that the Band should have this 25.4 square miles included in its Reserve, there is a very strong case that the Band is entitled to compensation for those revenues which it has not received. It can be equally strongly argued that the responsibility for payment of that compensation rests on Canada, where rests also the responsibility for non-fulfillment of the 1940 agreement, and all the consequences thereof.

In the light of the position of Canada summarized above it is hoped, and anticipated, that Canada will accept this claim accordingly.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Band's Position

This claim is put forward only as part of the alternative basis of the Band's position, and would be pressed only if it be held that the Band and its members no longer have aboriginal rights. In that case, runs the thrust here, the Band is entitled not only to compensation for the extinguishment of its title (which would encompass at least all, if not more than, the claims for damages or compensation discussed here) but also to damages or compensation for non-performance of the Treaty and non-receipt of the benefits which it was supposed to confer.

In this respect it is the Band's position that it was the obligation of Canada from the outset to locate and identify the various Bands and communities which lived in the Treaty area and to whom its provisions and benefits should apply, and that the existence and presence of the Lubicon Lake Indians as such a Band or community was a fact in 1899 and for generations prior to that time. Hence the claim for these benefits, and for compensation for the non-receipt thereof, commences from 1899, not just from the time when they were in fact identified and promised a Reserve in 1940.

The claim has not yet been developed in detail with respect to each of the various benefits. I will accordingly deal with the matter further in the "Remarks" Section hereunder, and make some suggestions as to what approach might be taken with respect to clarification and quantification of the claim with respect to these benefits.

Position of Canada

Canada has indicated a readiness to discuss the various sub-heads of this claim, although making as yet no formal admission of liability. Where individual members of the Lubicon Lake community have been denied social services or annuities as a result of unjustifiable removal from the Band List, Canada is in principle prepared to address the matter of recompense to those persons.

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits (cont'd.)

Position of Alberta

Alberta is not involved in this area of claim.

Remarks - Including Areas of Possible Reconciliation or Accommodation

The benefits here are of two kinds: money payments; and provision of tools, livestock and farm implements, hunting and trapping equipment, and clothes. I have attached hereto as Appendix "A" two pages reproducing the relevant paragraphs of the Treaty providing for these benefits. For convenience I have marked them, and will refer to them in what follows, as Paragraphs A, B, C, D and E respectively.

It has been noted that the Band's position is that this claim (which again rests on Treaty entitlement only as an alternative to the claim(s) based on continuing Native Title) dates back to 1899. Without, however, for a moment presuming or intending to question the validity of that contention, it is a fact of which account should be taken that the Band was recognized as such in 1940 and was then promised a Reserve, which promise has not been fulfilled to this day. Even if it were to be held that there was no obligation until the Band was in fact formally identified and established, the year 1940 would stand as at least the minimum point from which the calculation should commence. The comments which follow are equally applicable whatever be the starting date.

As to the money payments, which are called for under Paragraphs A and B, apart from the matter of the starting date, the main problem would seem to be in establishing the numbers of those entitled to receive the payments. This applies particularly with respect to the annual payments to be made pursuant to Paragraph B on the basis of population. Such payments have been made, but deficiencies appear to exist on account of deletions such as were made following the McCrimmon Report and the application of the "counted once" (or counted elsewhere) rule. Controversy over the figures properly constituting Band membership continues to this day: I shall

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

have to reach a conclusion for the purpose of my final Report, but it has not been possible to do so by this time. From such information as I have presently received, however, I am reasonably satisfied that final resolution will indicate that there have been appreciable deficiencies in payment over the years and that when a final calculation can be made a considerable sum will be found to be due on account thereof.

As to the provision of tools called for in Paragraph D, there can be little doubt that, whatever the starting date, the qualification for eligibility for that benefit is met. The same applies to qualification for eligibility for the provision of farm implements, livestock and seeds in Paragraph E ("elects to take a reserve and cultivate the soil"). The Report of the Indian Agent (August 14, 1939) on his discussion with the Band as to their wishes in this regard shows not only that they wanted the Reserve, but that they wished "to learn agriculture" for the years ahead. There can surely be little question, on the basis of their attitude and on the basis of the experience with other bands, that this would have applied whenever this Band had been identified and recognized: they would have wanted then the things to which recognition and establishment as a band entitled them. They would accordingly have been eligible to receive the annual supplies enumerated in that Paragraph from that time forward. It would follow that the failure to receive them is due to the failure by Canada to discharge its obligations, whether arising generally in 1899 or specifically by the agreement of 1940. And since clearly some members would have wished to continue hunting they are entitled to compensation for supplies of ammunition and twine not received annually over the period in question.

The quantification of these claims is admittedly somewhat complicated, and I am clearly not in a position to do so at this time. There are however certain observations which can be made or principles suggested which, it seems to me should, subject to modifications suggested by such precedents as may exist, govern the calculation. The first is that the defici-

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(ii) Treaty Benefits

Remarks - Including areas of Possible Reconciliation or Accomodation (cont'd.)

encies in the annual payments have the character of debts owing to the Band from the time they occurred. A debt normally carries interest until the date it is paid; the fact that these are debts due by the Crown should not - especially in view of the fiduciary relationship between the parties and the very difficult situation which has been created for the Band as the result of Canada's long delay in carrying out its obligations - be taken as grounds for treating these debts differently. I consider therefore that interest should be added, and that the rate applicable should be that payable on Government of Canada Treasury Bills. The calculation, because of the fluctations in rates over the period in question, will be complicated. One method might be to apply the average of that rate over that period, but I have not had the opportunity of discussing this matter with representatives of the parties, and a conclusion on this point will have to await further discussion. Account should also be taken of the factor of inflation.

As to the tools, livestock and implements not received, the result of this failure is that the Band and its members have been deprived not only of the capital value of the items themselves, but also of the annual income to which their use on the Reserve would have given rise. Although this would be a foreseeable consequence of alleged breach of duty to locate and identify the Band after 1899, and certainly of the failure to carry out the agreement of 1940, its translation into an annual figure for each of the years in the period involved is again a formidable task, calling for detailed mathematical calculation and much expertise in such matters. Again, this is a matter which should be the subject of further discussion.

Band representatives have emphasized that this claim for compensation for lost Treaty benefits is secondary, and in the alternative, to the claims based on un-extinguished Native Title: the Band's basic and primary position is that its Native Title was not extinguished by the Treaty or subsequently. and that it is entitled to compensation for

the damage it has suffered as a consequence of acts done contrary to its rights and interests under that title. It is only if it should ever be held, or agreed, that it cannot or should not maintain its claim on that basis that the claim on the basis of Treaty entitlement would be pursued. It is not the Band's intention to claim both.

(iii) Programs and Services

Band's Position

The Band claims compensation for those programs and services which (apart from the specific Treaty Benefits dealt with above) are provided by Canada to Indian Bands generally, and which it has not received. It is the Band's position that the reason why it has not received the benefit of such programs is that it has not been settled on a Reserve and that the responsibility for this fact is again that of Canada. The Band claims that it is entitled to monetary compensation from Canada for the value of the programs and services not received.

Band spokesman have expressed the view that this claim is not inconsistent with the claim based on continuing Native Title: they are simply asking for what Canada has apparently always recognized as its responsibility to provide for recognized Indian communities, whether under Treaty or otherwise. To the extent, however, that it may be held or agreed that the claim is inconsistent with the claim based on Native Title, the Band would not press this claim, except as part of the alternative position if the decision on continuing Native Title should be adverse.

The claim embraces the cost or value of such items as Canada normally provides by way of assistance in the construction and maintenance of housing and community buildings and infrastructure such as water and sewage systems and roads, and social services including schooling and medical care.

The Band has not provided a detailed break down of the claim with respect to those various items, although I have received a Table showing the short-fall in terms of what would have been the total value of all such benefits had they in fact been provided. This is calculated annually on a per capita basis, first by dividing the total amount allocated by Canada each year for Indian programs by the total number of

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Band's Position (cont'd.)

status Indians in the country for whom such programs were provided, and then multiplying the result by the figure of the Band population. Additional calculations are made to add interest at the effective rate for the year of (non) receipt, and to bring the annual totals into terms of current dollars by allowing for variations in the annual Consumer Price Index. Deductions are made for the value of such programs and services as are admitted to have been in fact received - which in this calculation is said to have begun only in the year 1974. I shall make further reference to this Table in the "Remarks" section hereunder.

Position of Canada

Canada has indicated by letter of the Minister dated December 14, 1983 to the Alberta Government that a "catch-up" program for the Band's housing, economic development and community infrastructure needs is, in Canada's view, something which should be provided, and in recent discussions with Canada's representatives I have been informed that such a "catch-up" program could be part of an ancillary agreement to settlement of the Reserve Lands.

Canada does not admit, however, that there has been any significant shortfall in its provision of social service benefits to Band members. Where individual members of the Lubicon Lake community have been denied social services or annuities as a result of unjustifiable removal from the Band list, Canada is in principle prepared to address the matter of recompense to those persons. Further, Canada would include as a heading for the negotiation of compensation, the matter of reimbursement to individuals for moving costs and loss of improvements during the transfer of residence to such Reserve lands as may be allotted.

Position of Alberta

As the provincial authority, Alberta of course does not stand responsible for such shortfall as may exist in respect of Treaty benefits or social service programs normally

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Position of Alberta (cont'd.)

provided by Canada, or for costs of a comprehensive community development program. Alberta has, however - and this should be noted - incurred the expense of some housing assistance to Band members in recent years at Little Buffalo Lake.

Remarks - Including Areas of Possible Reconciliation or Accommodation

The Band dates its claims here from the year 1899 on the same basis as previously outlined: that it existed as an identifiable Indian Band or community at that time, and that Canada's obligation in these respects commenced no later than that year. Again, without pre-judging or denigrating that position it can be observed at the outset that if Canada had no earlier obligations to identify and deal with the Band, its obligations surely commenced no later than the year 1940, the year of the specific recognition and promise. Again, the observations which follow are applicable whatever year be determined as the starting point.

As to the numbers of people entitled to those benefits for the purpose of calculation of the claim, the Band has used the figure of 400 throughout. The recent discussions with Band representatives have clarified the basis on which this figure is submitted. In brief, this is that the genealogical studies referred to earlier support the conclusion that the membership in this community was a large and growing one, possibly as high as 2,500 - 3,000 by 1918, when it was decimated by the flu epidemic of 1918-19, which is known to have wiped out up to 90% of communities in that area; that the population has grown gradually since then to the figure of 450 identified by that genealogical study as the present population; and that accordingly the figure 400 represents a fair average of the population throughout the period.

This is understood, but it must be observed that the approach raises again the problem of whether the numbers thus found to be members of the "community" are acceptable as determining the membership of the Band for purposes of calculating entitlement in this context, as it does with respect to the

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

calculation of entitlement to Reserve land discussed earlier. It seems that the questions both of the starting date and the population figures to be used for the calculation of this claim are matters still to be discussed and settled between the Band and Canada.

Subject thereto, however, it seems that in principle the Band has a valid claim, to the extent that it can be documented that there was a shortfall between what they should have received by way of such programs and services had they been settled on their Reserve, and what they have in fact received since the time when they should have been so settled, whatever be agreed as the date when that should have taken place.

There are a number of other details which require to be discussed and settled. Thus with respect to housing and community infrastructure: although some houses were provided at Little Buffalo under a provincial housing scheme, this was protested by the Band, as was the case with the roads which were laid down by Alberta in that community. The Band maintains that the houses were in any event never properly finished, and that what was done by the Province was in contravention of, and as part of an effort to undermine, the Band's position that it had Native Title to this area, and that no credit should be given for the costs of such buildings or installations, certainly not at the expense of the Band's claims against Canada in this respect. And while Canada has provided some housing and community buildings, I understand that this was not done until 1980-81 and that the substantial majority of members of the community still require housing assistance. There is clearly a deficit here in what has been provided by Canada in the way of housing, community buildings and infrastructure as compared to what has normally been provided to Indian Bands, which support the Band's claim and calls for discussions in detail.

Similarly with respect to the non-material, or social services aspect, of this claim: Canada claims that for some years at

Claim - 5. COMPENSATION FOR PAST LOSS:

(a) With Respect to Lands Claimed as Reserve

(iii) Programs and Services

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

least Band members have received benefits under social service programs which are the equivalent of those being received by other Bands. It is alleged that the difference is mainly, if not entirely, in respect of those individuals (and their affected family members) who were unjustifiably removed from the Band list after 1940. Canada has indicated a readiness to make recompense in such cases. I have asked that Canada make a study to compare the levels and values of services and programs which would or should have been provided by Canada from the time when the Band should have been identified and commenced receipt of these benefits, with the levels and values of those actually received, but the results are not yet available. I would urge that this be expedited, and that the results be studied by representatives of both sides in the same spirit of readiness to make recompense as was indicated with respect to those improperly removed from the Band list.

Account should also be taken of the Band's contention that not only is there a substantial deficit in the receipt of social services by actual Band members in terms of the commencement date and the quantum of such programs as were received, but that a large proportion of members of the community have never been on the official Band list and have never received any such benefits. The problem to be addressed here seems in part at any rate to be of the same nature as that involved in determining the numbers of those to be counted for the purpose of establishing the area of Reserve entitlement.

Finally in this connection it has been suggested that this claim might be subsumed in, or at least modified to the extent that there is assurance of, an accelerated and meaningful catch-up program to settle the Band on its Reserve when that is established, including housing and community buildings, roads, sewage and water systems, and organization and delivery of full social service programs including schooling. That matter will be dealt with more fully later under the head of Claim 8.

It is hoped that these considerations and suggestions may afford the basis of further discussions between representatives of the Band and of Canada leading to a satisfactory resolution of this area of claim.

(b) With Respect to Lands Claimed as Traditional Area

(i) Loss of Livelihood from Trapping and Hunting

Band's Position

The Band rests its claim here primarily on the position that it has never surrendered its native title to this area, and that such title and the rights thereunder have never been extinguished; or alternatively that if they have been extinguished (by, e.g., assertions and acts of sovereignty by Alberta) - which is not admitted - it was without their consent and the Band is entitled to compensation and damages for the consequences. For the purpose of these discussions, and without prejudice to its claim based on native title, the Band points secondly to the assurance given in the

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Band's Position (cont'd.)

Treaty, reflected in sec.12 of the Resources Transfer Agreement, that the Indians would have the right to carry on their usual vocations of hunting, trapping and fishing throughout the area.

With reference to this second basis of its claim, the Band recognizes that there are words of apparent limitation on the extent of the right, contained in both the relevant paragraph of the Treaty and in sec.12 of the Agreement, but takes the position, as I understand it, that it was not the intent and is not the effect of those words that the rights thus assured and recognized could be eliminated at will by the mere grant of limited exploration and development rights in the area in question. According to this position, these lands are not thereby rendered "occupied" lands in any meaningful sense of that word, hence their rights still subsist and they are entitled to compensation for the damage done to them - or again, that if the rights have been eliminated they are entitled to compensation for that loss.

The claim thus far is directed against Alberta; in the final alternative the Band says that if the effect of the Transfer Agreement was to give to Alberta the power to extinguish the rights in this area assured to the Indians by the Treaty, then Canada was negligent or in default of its trust obligations in failing to live up to and protect that assurance, and Canada is liable to the Band for the damages it has suffered as a result of that negligence or breach of trust.

As to quantum, the Band dates this claim from the start of development activity in the area in 1979-80. I have been provided with a copy of the Report dated September 15, 1982, by Kenneth R. Bodden, an expert in the matter of wildlife resources and harvesting, which was filed in support of the Band's claim in the Alberta Court of Queen's Bench. This report shows the amounts of wild animal meat of various species taken and consumed by the Band in each of the years 1980-81 and 1981-82 (Table 3) and the amounts and values of total Fur Harvest Revenue for the same years (Tables 4, 5

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Band's Position (cont'd.)

and 6). I have also been provided by a Band spokesman with a summary which takes the figures back to the year 1979-80, and summarizes some of the comparative results to show the decline or loss as between 1979-80 and the present.

That summary is stated as follows:

> Bodden calculates the value of fur taken in 1980-81 as $205,969, or about $4,000 per family. This amount was down from an average figure of slightly over $5,000 per family the year before. By 1981-82 the figure had dropped to a total of $163,573, or only about $3,200 per family. Last year average income from trapping was down to $800. This year's average is expected to be less than $400.
>
> Bodden calculates the value of production generated by subsistence activities in 1980-81 as $209,630, the largest percent of which was contributed by the value of moose killed for food. Over 200 moose were killed per year prior to 1979-80. By 1980-81 moose kill had dropped to 110. In 1981-82 moose kill was 101. In 1982-83 kill was 27. Last year moose kill was 19. This year moose kill has not been fully calculated but the total is expected to be less than 19.
>
> Thus income from trapping has dropped from over $5,000 per family to under $400 per family since the onset of development activity in 1979-80, or, from a total of about $255,000 in 1979-80 to only about $20,000 this last year.
>
> Similarly production generated by subsistence activities has dropped from a community total of approximately $400,000 in 1979-80 to less than $40,000 in 1984-85.

Position of Canada

Canada rejects any aspect of this claim based on continuing native title, its position being that native title was extinguished by Treaty 8 throughout the entire area covered by that Treaty. As for liability based on failure to ensure continuance of hunting and trapping rights assured under the Treaty (negligence or breach of trust), Canada does not accept this, pointing to the qualifying words or words of restriction in both the Treaty paragraph and in sec.12 of the Resources Transfer Agreement.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Position of Canada (cont'd.)

In effect Canada is saying, as I appreciate it, that although the Treaty assures to the Indians the right to pursue their usual vocations of hunting and trapping throughout the area, there is nothing in the Treaty which assured them that the supplies of animals for that purpose would be maintained or remain at existing, or any, levels. And further that indeed the Treaty contemplated restriction on or diminution of the quantity, in that the same paragraph assuring the right expressly provides that it may be diminished by excepting therefrom such tracts as may from time to time be taken up "for settlement, ... or other purposes."

Canada's position is that there is thus no negligence or breach of trust on Canada's part in having transferred the land to Alberta on a basis which permits Alberta to open up this area for development purposes, even if that has the result of diminishing the stocks of wildlife available for the exercise of the right of hunting and trapping, so long as the right itself remains undiminished with respect to the tracts which are not in fact so occupied or taken up by that development. This position is, so far as I understand it, based on the view that it is the right which is protected or assured, not the maintenance of the level of harvest available as the result of exercising that right.

Position of Alberta

The position of Alberta appears in effect to be much the same as that of Canada. Alberta does not recognize any claim based on continuing native title. As to the continuing right to hunt and trap assured to Indians under the Treaty, Alberta's position is that it owes no obligation to the Band under Treaty, that any claim here must be addressed to Canada, and that in any event Alberta is not in breach of the only obligation or pledge in this area which it gave to Canada as protector of the Indians, namely, under sec.12 of the Resources Transfer Agreement, to allow the Indians the right of hunting and trapping for food at all seasons of the year on all unoccupied Crown lands.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears from the foregoing that there are formidable obstacles in the way of even a common approach to, let alone an agreed solution of, the issues arising under this head of claim. Nevertheless, I consider I should make some analysis of the areas of difference and disagreement, in the hope that some suggestion for at least a common or shared view of the problem may emerge which would form the basis for further discussion.

The dimensions of the problem seem, as is so often the case, to fall into two areas or categories, which may be designated as the practical or factual area, and the legal area. In the former are such questions as, what loss has in fact been suffered by the Band, and is that loss in fact attributable to oil and gas development or are there other causes, including natural cycles? In the other category are of course the questions first, if there has been such loss due to other than natural causes, does there exist a legal basis for an assertion of liability and, if so, against whom? And secondly, if there can be no common ground as to the strict legal position, can there be any common approach based on what may be called the practical equities of the situation?

As to the factual question of what has been the loss, I have referred to the table in Mr. Bodden's Report, and the summary submitted by the Band on the basis thereof. In fact, no statistical research or other authority is quoted in that summary with respect to the information for years other than 1980-81 and 1981-82, and the conclusions are thus subject to verification. Also, no figures are given for similar summary comparison between 1979-80 and the present with respect to other areas surveyed by Mr. Bodden. It is a fact, however, that with respect to both hunting and trapping, the careful survey conducted by Mr. Bodden shows a substantial reduction in both quantities and values of animals taken as between 1980-81 and 1981-82. My own discussions with Band members, while being far from a scientific survey, indicate that the decline did start from 1979-80 and has gone on apace from then until the present.

Claim - 5. COMPENSATION FOR PAST LOSS

(b) With Respect to Lands Claimed as Traditional Area
(1) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

I would suggest accordingly that it be accepted in principle - or for the purpose of further discussion, unless and until the contrary is proven - that there has been a substantial and damaging decline in the livelihood derived from the traditional area over this entire period. If agreement can be reached in principle, then of course it would be desirable that the Band take the steps necessary to establish the total amounts in detail in accordance with such method as may be agreed.

As to whether this decline is due to the impact of development, or is due to natural or other causes, there is not agreement. I have heard it suggested that it is due to natural cycles - some of the species of animals concerned are known to be subject to cyclical waves in population. Mr. Bodden himself remarks on this, and on the corresponding effect brought about in the population of predators by cyclical changes in the population of the animals which are their prey, such as rabbits and hares. And while Mr. Bodden outlines the decline as between the two years which he studied, he does not state that this is due to the impact of development. Others have suggested that the decline in take is due to the growing disinclination of Band members to follow the traditional but arduous pursuits of hunting and trapping for their livelihood. This is denied by the Band members to whom I have spoken who traditionally engage in these pursuits: they are firm in stating that they have continued - in some cases increased - their efforts in the face of development activity, but that in spite of their best efforts they have not been able to maintain their harvest from these activities. Concrete examples have been given of the disruption of traplines and the flight of, for instance, the moose population.

The hard fact is, of course, that the decline in the annual harvest commenced with, and has continued during, the period of active development - that is the evidence. On the other hand, while there has been reference to natural cyclical changes as an explanation, there has been no hard or scientific evidence that such a change was due or was in fact

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

taking place. I have been flown over the area and have seen what is involved by way of seismic grid lines driven through this previously wilderness area in a criss-cross pattern, and of installations dotting the previously unlittered landscape. It is a fact, of course, that construction and servicing of such installations involve the intrusion and movement of heavy mobile equipment into and through the area. I am no expert in this matter, but I do share the general knowledge of the adverse effects such a pattern of intrusion and development may be expected to have on shy wildlife species by way of the disruption of breeding cycles and changing of patterns of movement, rest and refuge.

I venture to suggest, then, that in the absence of proof that there is or was a natural cyclical change due at this period, the weight of the evidence is that the decline in harvesting from hunting and trapping is not attributable to the coincidence of a cyclical change, which is speculative, nor to a sudden disinclination on the part of Band members to pursue their traditional means of living, which is not proven, but is due to the impact of development which is an established fact which coincided with the onset and continuance of the decline, and which decline is consistent with the known fact that many of the species of wildlife population involved here are averse to such human intrusion and interference.

As to the questions of law and equity, it is hardly appropriate for me to make a pronouncement on the first. The question of whether there was subsisting native title to the traditional area when development began, or whether and when it was extinguished, and the legal consequences flowing therefrom, are before the Courts in the various actions commenced by the Band, prosecution of which has been held in abeyance during the currency of this Inquiry. No party has indicated any change, or likelihood of change, in its views on this legal matter during the course of my discussions. In these circumstances it is not to be expected that anyone at this stage will be prepared to entertain further

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

discussion shaped by a firm statement of opinion from me on this question - even if it were proper for a person in my position to make one at this point.

I shall accordingly confine my comment on this point to two observations which I believe are in order and are relevant. The first is that it is far from certain what would be the outcome of litigating the question: there are powerful arguments to be made on both sides. The other is that whatever might be the outcome, there is no doubt that the process of pursuing it through the Courts in the ordinary way in the various actions now outstanding would be very lengthy and exceedingly costly, with results equally crushing to the loser, whichever side that might be. I hope therefore that the parties will find it possible, and acceptable, to enter into serious and meaningful discussion of a solution of this claim - and others where the same question is involved - on a basis which will recognize and give effect to the equities and practicalities of the situation, leaving in abeyance the question of strict rectitude of either legal position, in order to produce an answer with which all can live.

This brings us logically to a consideration of what may be the rights and obligations created by the Treaty in the context of this situation. It is true that the Band does not rest its claim here on Treaty entitlement except as an alternative and last resort, stating rather that they have never adhered thereto, but Canada's position is that although native title was extinguished by the Treaty, there was substituted therefor, in the case of Indians such as this Band, the right to adhere to the Treaty and to claim and enjoy the benefits thereby conferred. And although Alberta takes the position that it has no direct obligation to the Band under the Treaty, it agrees that it does have those obligations to Canada contemplated in the Resources Transfer Agreement to enable Canada to discharge its Treaty obligations to the Indians. Thus far Alberta has stated this position

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

only in the context of the question of Reserve land entitlement under the Treaty and its own obligation under sec.12 of the Transfer Agreement, but I am hopeful that both Alberta and Canada may be prepared to consider the question of obligations in the context of hunting and trapping rights assured under the Treaty as well.

This approach in my view is suggested by the wording of sec.12 of the Transfer Agreement. It is admittedly difficult to assert and validate the concept I have outlined in terms of strict legal obligation or liability arising under the wording of the Treaty and the Agreement, but I consider that it can be demonstrated that something is owed in terms of what is equitable. Again I stress that law and equity are not strangers, and I suggest that the facts of the situation be examined on this basis.

This approach looks first at the words of that paragraph of the Treaty which assures to the Indians that they shall have "the right to pursue their usual vocations of hunting, trapping and fishing throughout "the area in question. True, this right is to be exercised subject to regulations - but this does not contemplate or intend the extinguishment of the right. Then follow the only words of limitation: "saving and excepting such tracts as may be required or taken up from time to time for settlement ... or other purposes." There is one view that says these words clearly contemplate that the right - or at any rate the assurance of a yield from its exercise - may be diminished or terminated by subsequent policies or acts of the sovereign. But that this was not the intention is, in the view under consideration here, established by what was agreed to between Alberta and Canada when the Crown lands were transferred to the Province. Section 12 of the Resources Transfer Agreement starts with the words: "In order to ensure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence ..." (emphasis added). Clearly this contemplates the very opposite of the termination of the supply: rather it contemplates the continuance of the

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

supply in fulfilment of the right assured to the Indians under the Treaty, at least for such time as the Indians must rely upon it "for their support and subsistence". And in order to ensure the continuance, "Canada agrees that the laws respecting game in force in the Province ... shall apply to the Indians ...": but this contemplates laws intending to ensure that continuance, such as bag limits and seasons, which is the object of game laws, not a system or a right to end that supply or its availability.

Then follow words which some argue indicate an intent - or at least confer an absolute right - to limit or end the benefit thus assured: "Provided however that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." But if one considers these words in their full context, this provision is seen to be inconsistent with such an intent. The immediately preceding passage has as its intent the securing to the Indians of the continuance of the supply, and to this end has provided that the exercise by the Indians of their rights is subject generally to provincial game laws (which have as their object the preservation of stocks of game animals): that passage lastly quoted is a loosening of this restriction to make clear that the right of hunting and trapping for food (i.e. for subsistence, as distinguished from commercial purposes or support) may be exercised at all seasons of the year on unoccupied Crown lands and all other lands to which they may have access.

No one has suggested that the granting of development permits, or the seismic grid lines and installations placed in this area pursuant thereto, have removed the whole of the traditional lands generally from the category of "unoccupied Crown lands" so that the Indians have not the right to hunt and trap thereon. There is disagreement as to whether the Province has jurisdiction, and/or as to the extent of that jurisdiction, to diminish the rights secured by Treaty read

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

in conjunction with s.88 of the Indian Act, but it is noted that the Courts have recently tended to interpret this question in favour of the Indians. In any event, Provincial game laws do not prevent or restrict them from access to their traditional area for the purpose of hunting and trapping: the point is, that the availability of game upon which they rely for their support (fur and hides for commercial sale) and subsistence (meat for food) has been seriously diminished as a result of development, notwithstanding that the continuance of the supply was, by the agreement of both governments, to be secured to them.

As I appreciate it, it is not the position of the Band that development must stop or that the continued availability of supply be assured to them forever exactly as it used to be. Rather they recognize that as time passes their own people will probably turn more and more to other ways of living, and their continuing dependence on this supply for their livelihood will be increasingly diminshed. (This aspect of their position has been more fully set out under Claim 3 above.) But they claim compensation in full for the loss they have suffered to date, on the basis of unextinguished Native Title or alternatively that what was assured under the Treaty, the right to the continuance of which was recognized by both Governments in the Resources Transfer Agreement, and upon which they have depended for their livelihood, has been seriously diminished by the unrestricted development which has been allowed to take place without their consent and before they have had time to adjust. The equities of this situation, in the context of what has been discussed above, seem strongly to support their claim and I am hopeful that further discussion, in the light of the approach suggested, may result in the establishment of an acceptable basis for agreement and settlement.

While I am most anxious to avoid putting anyone off by appearing to "point the finger", as it were, there is one other point which I think cannot be avoided. That is the question of which government should pay, if it be accepted that there is a valid claim. While it cannot be denied that Canada has some obligation in that Canada gave the first

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(i) Loss of Livelihood from Trapping and Hunting

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

assurance, it seems to me that - again looking at the equities - the obligation to compensate should be that of Alberta. Alberta was a party to the Resources Transfer Agreement of 1930 which carried the assurance forward. Alberta has long administered these lands, and it was Alberta which permitted the development in question and has derived very substantial revenues therefrom - far beyond the amount of this claim. The position here is quite different from that with respect to the Reserve lands themselves: there, Alberta had been ready for many years to transfer the agreed area, and responsibility for the failure to secure the Reserve and the benefits therefrom to the Band was entirely that of Canada: whereas here, Alberta had agreed that the Indians should continue to enjoy the rights and benefits in question but authorized the development which destroyed or diminished the benefits of those rights, and took the revenues therefrom, without any notice to the Band or to Canada. The equities here seem clearly against Alberta.

Indeed, there is one aspect of Alberta's position in another context which supports the suggestion that Alberta may be ready to accept responsibility here. I refer to Alberta's indicated readiness, without prejudice to the general denial of liability or breach, to discuss the matter of the application, and possible modification, of the Trappers Compensation Program so as to bring the area of compensation to the Band for loss of revenue from trapping while stocks of wildlife are being re-built, within the ambit of that program. This was spoken of in the context of compensation for future loss, but it occurs to me that there might be some willingness to consider it in the context of past loss of trapping revenue as well.

(ii) Oil and Gas Revenues

Band's Position

The Band claims compensation in an amount equal to all lease and royalty revenues derived from exploration for and development of oil and natural gas throughout its traditional area.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues

Band's Position (cont'd.)

The claim is based primarily on the Band's assertion that, since it did not adhere to the Treaty, it has unextinguished native title to this area and those revenues are its as of right, or that if title was extinguished by the fact of such exploration and development, the revenues are owed as compensation for that extinguishment. The Band claims these revenues as the measure of damages or compensation owing for the failure to protect its interests under that title.

The first branch of this claim is directed against Alberta, and the total of revenues received and claimed is understood to be in the area of $700,000,000.00-$1,000,000,000.00. The alternative branch of the claim would appear to be directed primarily against Canada, on the basis that Canada had the obligation to protect, and was negligent and in breach of its fiduciary duty in not protecting, the Band's Native Title to the area and its interests thereunder.

Reference should also be made here to the Band's further position, of which I have only recently been fully apprised, that by virtue of its continuing Native Title it has a claim to damages for the results of the intrusions it has suffered and the consequent disruption and destruction of its way of life. The claim might be in the nature of, or comprehend, an action in trespass, and would include as parties the governments which permitted or authorized that wrong, and one measure of the damages would be the revenues realized as a result. This claim, of which I have only recently become

aware, is more fully discussed in a new portion of this Discussion Paper to be inserted after page 67.

Position of Canada

Canada does not accept liability for payment under any aspect of the claim put forward as against it. Canada's position is that Native Title was extinguished by the Treaty, whether or not the Band adhered thereto, so that there was no negligence or breach of fiduciary duty in permitting Alberta to authorize development of the resources and retain the revenues. This same position would be put as the answer to any claim for these revenues based on trespass, or having authorized or permitted a trespass.

It should be noted, however, that Canada does appear ready to support the Band's claim to reasonable compensation for the actual loss of livelihood and to a program for rehabilitation and protection of wildlife to support that way of life in the future.

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues (cont'd)

Position of Alberta

Alberta does not recognize any claim based on continuing native title. In addition, Alberta's position generally is that its only obligations in the context of lands or mineral rights with respect thereto claimed by Indians are obligations to Canada which arise pursuant to the Resources Transfer Agreement and are triggered only by formal request from Canada pursuant thereto. Alberta therefore rejects any obligation to account for oil and gas revenues and royalties. Alberta would also reject any claim for damages based on trespass or permitting trespass and disruption, although Alberta also has indicated a readiness to discuss a "model management program" designed to rehabilitate and preserve stocks of wildlife and control the environment.

Remarks - Including Areas of Possible Reconciliation or Accommodation

In my initial discussions with Band representatives it was not clear to me (if indeed it was advanced at all) that the claim here included the value of the oil and gas extracted to date, as well as the lease and royalty revenues derived therefrom by government. I regret if this was a misunderstanding on my part, or a failure to appreciate that, since the Court actions include the Oil and Gas Companies as defendants, this aspect of the claim should have been addressed in my discussions. The result has been that I did not raise this aspect of the matter in my discussions with the Oil and Gas Companies (Third Party Interests) referred to in earlier portions of this Paper - or indeed with the representatives of either Government. As a result, I am not able to state with certainty what position they take in response.

On the basis of the facts, however, and what is known of their response to the Band's basic position that it has continuing Native Title, I would assume that all other parties concerned would deny liability to the Band with respect to that portion of this claim relating to the value of the oil and gas extracted from the traditional area, as they have done with respect to the lease and royalty revenues

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

resulting from that development. That is, all concerned will deny any liability to the Band on the basis that it had continuing Native Title to this area, or that there is liability in trespass or otherwise for entry (or authorizing or allowing entry) for development with resultant disruption of the traditional way of life.

In searching for a route to possible adjustment or reconciliation of differences in this sub-head of Claim, it is difficult to find an alternative approach as was suggested with respect to the previous sub-head (Compensation for Loss of Livelihood from Trapping and Hunting). There, the continued right of Indian people to derive their livelihood from those pursuits was expressly recognized by both Governments, whatever may have been the situation with respect to Native Title, and a review of the relevant considerations seems to support the view that it would be equitable that Alberta, as the Government which derived the revenues from oil and gas development, should compensate the Band for the consequences thereof in the diminution of the livelihood derived from that right. These considerations do not apply, however, to the Band's claim to oil and gas rights in the traditional area, which were not so assured to them and on which they had not previously relied for their living. Nor is there here the same alternative foundation for the claim to compensation for oil and gas revenues not received as there is with respect to those derived from the Reserve area: in that case, the Band's case rests upon the alternative position that it should have been recognized and established on a Reserve shortly after 1899, and that in any event it had been specifically promised the area in question as a Reserve in 1940 and would have enjoyed those revenues but for the non-fulfillment of that promise.

I am, therefore, unable at this time to suggest any specific compromise or adjustment which might reconcile the differences between the parties in respect of this particular sub-head of Claim. Perhaps I may be permitted, however, to point out that if the considerations I have put forward in previous

Claim - 5. COMPENSATION FOR PAST LOSS:

(b) With Respect to Lands Claimed as Traditional Area
(ii) Oil and Gas Revenues

Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd)

sections of this Paper in fact lead to acceptance of the accommodations there suggested with respect to the claims for past losses of oil and gas revenues on Reserve land, of Treaty benefits, programs and services, and of loss of revenues from hunting and trapping, then the Band will in fact receive substantial sums by way of compensation. It may be, then, that a generous recognition and satisfactory resolution of those claims, and of others such as Wildlife Management and Employment Opportunities where the problem seems more one of respect and accomodation for the interest concerned rather than payment of money, would conduce to some readiness to compromise with respect to the maintenance of this claim.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping Livelihood and Revenues

Band's Position

The Band believes - and I see no reason to doubt it - that the loss suffered in support and subsistence for its members from hunting and trapping in its traditional area will continue as the result of development at least until such time as there is instituted an effective Wildlife Management and Environmental Protection Program as discussed above under Claim 3, and that Program achieves its objective. The basis on which the Band rests its claim for compensation here is the same as that for the claim with respect to past loss in this category.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping Livelihood and Revenues

Band's Position (cont'd.)

As to the amount, the Band's position is that the loss should be measured by the deficiency in the value of each year's actual take as compared to the value in the year preceding the commencement of development (1979-80), and be paid annually as it occurs. Recognizing that there will over the years almost certainly be a diminishing number of members wishing to follow, and actually following, this method of obtaining their livelihood, the Band suggests that the loss be calculated and paid on a per capita basis - i.e., the total value in the base year divided by the number of persons then actually engaged in that activity, as compared with the yield on a similar per capita basis derived by those actually so engaged in each future year.

With regard to the possibility of bringing the trapping side of this loss within the ambit of the Provincial Trappers Compensation Program, the Band raises the question whether this presently provides a mechanism whereby individuals who trap for a living can be compensated for a shortfall in income due to the incursions of resource developers and other outside forces, as distinguished from natural cyclical changes. As it stands now, I am informed that the Provincial Program in place would reimburse the trapper with respect to loss due to development only for loss of equipment were his traplines to be damaged or lost through another's act.

The Band would be glad to discuss this matter with provincial authorities, although it believes that significant modifications to increase the scope and change the administration of any existing provincial program would have to be made to enable it fully to meet the needs and rights of its members. The Band asks, however, as a necessary preliminary to any such discussion, that its claims here, and with regard to hunting, be accepted in principle, and expects to receive the support of Canada in this matter.

Position of Canada

Again, Canada does not recognize any claim for compensation based on continuing native title. So far as the claim is

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping Livelihood and Revenues

Position of Canada (cont'd.)

based on the assurance under the Treaty of the continued right to hunt and trap, Canada's position seems to be that any claim here should be directed against Alberta, which has authorized the development which diminishes the returns, and has received the revenues from that development. Canada would use its good offices to assist in the conclusion of an accommodation between the Band and Alberta through the medium of the Trappers Compensation Program or otherwise.

Position of Alberta

Alberta also rejects the claim based on native title, but has indicated a readiness to discuss with the Band the modifications necessary, if any, to the existing Trappers Compensation Program to enable that program to meet the legitimate needs of those dependent on that form of livelihood.

Remarks - Including Possible Areas of Agreement or Reconciliation

In light of the readiness of Alberta to discuss modifications of the Trappers Compensation Program, if necessary to meet the position and needs of Band members who will be dependent on this form of livelihood in the future, I am encouraged to believe that agreement can be reached in this area which would achieve the position desired by the Band if preliminary and basic agreement can be arrived at regarding the administration of such a program. To date, the information I have been given is that Band members for the most part have not participated in the current program. The reasons given to me are, essentially, that the program as it now exists is ineffective because of:

(a) restrictions on the causes and types of loss for which compensation will be available; and

(b) administrative difficulties caused by lack of communication with, and consequent failure to take advantage of even that coverage now available by,

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(a) Hunting and Trapping Livelihood and Revenues

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

isolated communities such as the Band wherein the majority of trappers reside.

Essentially, I see here a lack of communication caused by the unfamiliarity with the administrative process by those sought to be assisted under the current Compensation Program, and if agreement can be reached between Alberta and the Band regarding modification of those provisions of the current legislation which provide for compensation so as to make it clear that loss resulting from development is covered, then a restructuring of communication channels between trapper and Program authorities should see a successful resolution of this matter.

This, of course, does not take care of the matter of future loss of livelihood from hunting, as distinct from trapping. It appears to me to be beyond question that the Band experiences a demonstrable financial loss here, in that moose meat, for instance, was a major subsistence item in its daily living, and has had to be replaced by commercial purchases of meat. This burden can be expected to continue in the future, at least until such time as the management program envisaged under Claim 3 is implemented and effective.

I would hope, accordingly, that Alberta, which derives the revenue from the development which produces this loss, will be prepared to entertain in principle a request for some compensation program here to help the Band meet the cost of this deficiency while it exists. It occurs to me that an approach similar in concept to the suggested program for compensation to trappers and co-ordinated also with the administration of the new or modified program set up for that purpose (perhaps under the overall Wildlife Management Program) might be an acceptable approach. I shall look forward to the prospect of assisting to bring about specific discussions between the parties on this subject.

Claim - 6. COMPENSATION FOR FUTURE LOSSES:

(b) Oil and Gas Revenues

Band's Position

Although the wording of the document "Points for Discussion" referred to at the outset of this Paper is sufficiently broad to include a claim for compensation to the Band for the value of oil and gas revenues and royalties to be derived from the traditional area in the future, Band representatives have now made clear the position that such a claim, based as it would be on continuing Native Title, would terminate with a satisfactory resolution of the other matters in dispute leading to overall settlement and particularly its settlement on its Reserve. (Oil and gas revenues from selected Reserve lands would of course accrue to the Band under the arrangements previously discussed.)

Remarks - Including Areas of Possible Reconciliation or Accomodation

In light of the above statement of the Band's position, it is not necessary to add anything further under this sub-head of Claim, except the comment that it emphasizes the desirability and importance of a satisfactory solution of the Band's claims generally, and the necessity of an approach on the part of all concerned to perceive and appreciate the deep-rooted and understandable apprehensions of the Band concerning its future unless it receives long-delayed and adequate adjustments and compensation for the neglect and injuries it has suffered, and on the part of the Band for the concern of Goverments for their overall constitutional and other responsibilities to all the citizens to whom they must account. I am sure that the the two Governments, and especially Alberta, will appreciate the significance of the possible termination of this substantial claim, and that there will be sincere efforts by all concerned to appreciate the positions and needs of the others and to explore every possibility of reconciliation and accommodation so as to bring about the all-embracing settlement desired.

Claim - 6.1 COMPENSATION FOR TRESPASS, WASTE, AND DESTRUCTION OF CULTURE AND LIFESTYLE

Band's Position

An avenue of claim advanced by the Band comprises damages for trespass and waste by others, under the auspices of the federal and provincial governments, of the Band's traditional lands and way of life. This claim includes compensation for damage to and loss of the aboriginal culture and lifestyle (as opposed or in addition to loss of income from the aboriginal means of livelihood such as hunting and fishing) consequent upon the entry and activities of non-aboriginal entities on the Band's traditional lands. Damages are claimed here to the extent that they can be quantified.

The Band holds that aboriginal rights include the right to maintain and carry on the traditional Indian way of life. Alternatively, that right is included among Treaty rights.

This claim is directly referrable to the invasion of the Band's traditional lands by non-native outsiders in the latters' endeavours to exploit and develop surface and sub-surface natural resources in that area. The compensation sought here can be described as "damages for negative effects on aboriginal people and destruction of aboriginal way of life, including interference with use of the [traditional] land[s], traditional activities, hunting and trapping, access to all of the traditional land, interference with burial sites, traditional practices and ties to the land, culture and traditions" of the Band community. The Band points to destruction of wildlife and the environment in its traditional lands as the waste which it says resulted from these outsiders' unwelcomed activities such as road building, cutting of lines, and construction of pipelines, wells and other projects in that area.

Alberta's Position

This particular claim topic was not discussed with Alberta, apart from the discussions referred to above in respect of compensation for Past, and for Future, Losses.

Claim - 6.1 COMPENSATION FOR TRESPASS, WASTE, AND DESTRUCTION OF CULTURE AND LIFESTYLE (cont'd)

Canada's Position

This claim was not addressed in my discussions with Canada's representatives, other than those noted above in the sections on Compensation for Past, and for Future, Losses and below, in Claims 7 and 8(a).

Remarks - Including Areas of Possible Reconciliation or Accomodation

This aspect of the Band's claim was not specifically noted in my earlier discussions with the Band. It has, however, been forwarded by Band representatives in our January, 1986 exchange, and accordingly draws my following observations.

Firstly, although this claim may be thought in some quarters as too theoretical or as a duplication of compensation claims set out elsewhere, the Band does recognize that money damages under this heading are possible only insofar as quantum can be determined - the Band's primary position is that interference with aboriginal rights, treaty rights, or independent hunting and trapping rights (under Section 12 of the Natural Resources Transfer Agreement) causes damages which are irreparable.

Secondly, that portion of the instant claim referring to damages for trespass and waste appears to be in reference to aboriginal title to the affected land as well as, by analogy, to the rights of hunting and lifestyle dependent upon the land. Aboriginal title has not been satisfactorily defined by the courts - rather it retains, to date, the judicial characterization of an "usufructuary right". Whether that characterization will be assisted by further court pronouncement and whether aboriginal title will be held in law to sustain an action for common law waste and trespass damages are not matters immediate to this Inquiry. At a minimum, however, description of this claim heading provides a fuller understanding of the Band's central concerns.

Further, the reference under this heading to the damages claim for loss of lifestyle/way of life/culture is also made without benefit of specific discussion by me with either government. This part of the claim is easily distinguished

Claim - 6.1 COMPENSATION FOR TRESPASS, WASTE, AND DESTRUCTION OF CULTURE AND LIFESTYLE

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

from the claim for compensation for loss of income or loss of production from hunting, fishing and gathering efforts.

However, I do not see in law precedent for compensation specifically addressing loss of lifestyle or culture due to technological change or social interaction between member groups of a political unit or, indeed, of the international human community. It appears that this aspect of claim is based on the premise that common law damages flow from what the common law would regard as normal and usual social and technological exchange and development. I do not know, without further discussion with the Band and the two governments, on what basis common ground can be had unless this claim heading is in effect identified with other measures which I hope it may be agreed will be taken to preserve the environment and natural resources of the Band's traditional lands on which the claimants and their forebears have so long depended.

In this context the following further comments may be relevant. It is unfortunate but nevertheless a fact that change in lifestyle has historically been the apparently inevitable consequence to a native culture of the arrival and advancement of the white man's civilization and economy, although I am not aware of any legal basis upon which monetary damages have been assessed and awarded for that consequence apart from the demonstrable economic losses flowing from the interference with native right and title. Indeed, Band representatives have themselves alluded to the possibility that future generations may well prefer - or at any rate decide - to follow that other lifestyle with its new economic opportunities. These facts seem to emphasize the desirability of generous attitudes towards acceptance of claims such as those for compensation for programs and services not received in the past (which might have eased the disruption), for employment opportunities and job training programs, and for a full and generous "catch-up" program to establish the Band upon its Reserve and bring it the benefits of educational and other services and programs which will assist the members of this community to recover from the severe dislocations and

Claim - 6.1 COMPENSATION FOR TRESPASS, WASTE, AND DESTRUCTION OF CULTURE AND LIFESTYLE

Remarks - Including Areas of Possible Reconciliation or Accomodation (cond't)

disadvantages to which they have undoubtedly been subjected and to adjust to the future problems which the continuance of development undoubtedly poses for them.

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Band's Position

The Band asks to be compensated for the costs and expenses incurred in pursuing its claims to date. Basic to this claim is the Band's position that it had been waiting since 1933 for action on its request to be given a Reserve and established thereon, and since 1940 for action to fulfill the promise then made to it; that renewed discussions and requests to protect its rights and interest threatened by the onset of oil and gas development produced no results so it had no alternative but to commence legal action to compel recognition and protection of those interests; and that the record establishes that had it not been for such action by it in the Courts and in other forums and the publicity and pressure thereby generated, it is doubtful whether even the progress towards a settlement represented by this current Inquiry would have been achieved.

The Band claims accordingly that it is entitled to compensation for the entire cost of the steps which it has been compelled to take in an effort to protect its position and way of life at a time when it had not even been given the basic requirement of a Reserve as its settled homeland and its very existence as a community was in jeopardy. A statement outlining these expenses, totalling $1,539,797.26 as at November 28, 1984, has been provided and is attached hereto as Appendix "B". This list was originally attached to a letter of the same date to the Hon. Mr. Crombie from Chief Ominayak.

A considerable portion of these costs is represented by interest on a Bank loan which the Band was compelled to take out to meet its need in this connection. Interest is calculated to September 30, 1984, and has continued since and will continue at the rate of approximately $9,500.00 per month until the Band is put in a position to repay the loan. The Band points out that it has also incurred further costs since November 30, 1984, including costs of research and representation in connection with this Inquiry. The Band acknowledges receipt of funds recently to apply on the loan and interest expense, and is prepared of course to provide details of all its costs and expenses to date in pursuing its claim, showing the balance owing after giving credit for such monies as it has received.

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Position of Canada

Canada's formal position to date has been to deny any obligation to pay costs incurred directly or incidentally in connection with litigation on the ground that these costs were incurred before negotiations were exhausted. Canada has however been providing some funding recently (under the Item of the Task Force on Treaty 8) on the basis that the Band is entitled to assistance in meeting its current costs of negotiation. Canada is also prepared to consider reimbursement for past expenses of organizing and carrying out field work, surveys and research and matters of a similar nature which are of the type which would have had to be done for, and can be used in the course of, the present Inquiry and negotiations arising therefrom, as distinct from counsel fees and other costs referable only to the litigation.

(It is important to note that Canada's position as summarized here should not be confused with the position in respect of the request for an interim advance on account of compensation to enable the Band to meet its pressing needs to make payment on account of the obligations referred to above. That advance will be made on a without prejudice basis: that is, as an advance against whatever compensation may finally be agreed to be due under all the various heads of claims for compensation including this one, without thereby constituting an admission of liability at this time in respect of any specific claim. I am advised that the submission for payment of such an advance, based on my Interim Report on that matter, is now before Cabinet, and that substantial progress has been made in moving it through the various stages required for final approval.)

Position of Alberta

Alberta is not involved in this head of claim.

Remarks - Including Possible Areas of Agreement or Reconciliation

It appears from the foregoing that there is the basis for agreement on a substantial portion of the Band's claim here - that portion not attributable solely to the preparation for and conduct of the litigation. But it is also apparent

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

that unless Canada is prepared to modify its position and include litigation costs as well, there will be a formidable task of segregating the amounts of legal fees and costs incurred which are to be accepted and paid as being of the type which would be incurred in the course of continued negotiation, including preparing the Band's claims for this Inquiry, from those which are to be rejected as having no relation to matters now being considered.

Thus with respect to fees charged for time spent in preparing pleadings and in preparation for appearances in Court: can it be said that these should be rejected as having no relevance to this Inquiry? For after all, the Band is surely entitled to have the assistance of legal experts in the preparation and submission of its position and in discussions thereof before me. The other parties have been assisted by their Counsel from time to time. And surely the time spent by Counsel in preparation of the material and of arguments for Court has been of value to them in their appearances before me. Perhaps Counsel fees for time actually spent in Court can be singled out for rejection, but where else is the line to be drawn, and how is it to be drawn with respect to other types of legal costs and costs associated with research, field work and surveys initially undertaken in preparation for the Court cases but undoubtedly of value, if not indeed essential, to the preparation of the full case in this Inquiry?

Not only is the idea of distinction between legal and other costs incurred as being of value in relation to this Inquiry on the one hand, and those of value only in terms of the litigation on the other, extremely difficult when it comes to its practical application, but I believe that there are, in the special circumstances of this case, reasons to question whether there is a sound basis for maintaining the position which necessitates the distinction.

I recognize that it is not normally the policy of the Government of Canada to reimburse persons or organizations for their costs in preparing and prosecuting a case against

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

Canada in Court, except to the extent that the Court may order in the outcome of the litigation. And here, according to the view expressed so far by Canada, the Band commenced its litigation before having exhausted the process of negotiation with respect to its claims. It is on these grounds that Canada has so far declined to entertain the claim for reimbursement of the Band's legal costs, at least with respect to that portion which can be shown (if such segregation is in fact possible) to have been in excess of what would have been required only for continued negotiation, including this Inquiry.

I suggest, with respect, that this approach overlooks the unique nature of the circumstances surrounding this whole matter. It must be remembered that the Band's claims go back as far as 1933, the year of its first Petition to be recognized as a Band and have a Reserve allocated to it in accordance with its entitlement under the treaty. They were promised that Reserve - an area specifically set aside and designated by agreement between them and the two Governments - in 1940. That was 45 years ago - and they still have not got it. Starting in the late 1970's they saw not only their traditional hunting area but the very area which they had been promised as their Reserve - their homeland - subjected to intensive exploration and development against their wishes and with distastrous consequences to them. Substantial revenues accrued from the Reserve, but not to their benefit, and still no action was taken on their behalf. It is not putting it too strongly to say that in all the circumstances it could appear - certainly it did to them - that if they had not started Court action in 1982, which was 42 years after the original promise, nothing would have been done for them to this day.

In such circumstances, when their need was urgent, their situation was desparate and was worsening daily, and their best efforts along the line of negotiation to protect their interests were producing no results in spite of the merits of their position, it could be said without exaggeration that there appeared to be no practical alternative but

Claim - 7. COMPENSATION - BAND'S COSTS TO DATE:

Remarks - Including Possible Areas of Agreement or Reconciliation (cont'd.)

recourse to litigaton. And it is a fact that it was not until after that recourse to litigation that meaningful negotiations - now including this Inquiry - were initiated by Canada.

All these circumstances taken together seem to me to suggest very strongly that this is an exceptional case to which the general policy mentioned above should not be applicable. And the very real and practical difficulty outlined above of segregating the legal costs into two categories further reinforces the case in favour of an exception. Finally, the very fact that there are such unusual and exceptional circumstances would dispose of the possibility that to accept the claim here might represent a precedent or a weakening of the policy generally.

With these considerations in mind I venture the hope that in the further discussions to follow as to the calculation and up-dating of this claim as submitted in Appendix "B", the representatives of Canada will find it possible to proceed on the basis that the full legal as well as the other costs attributable to formulation and processing of the Band's claims will be accepted in full.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:

(a) General

Band's Position

In view of the long delays and hardships suffered since 1940, multiplied since the onset of oil and gas development in the 1970's, the Band claims entitlement to a "catch-up" or accelerated program to settle it on its Reserve as soon as possible after that is established, to include the physical aspects of settlement and arrangements for the immediate establishment and full delivery of programs of social services at a level comparable to those which Indian bands receive generally.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Band's Position (cont'd.)

The Band's requirements and proposals have been summarized as follows:

1. A comprehensive socio-economic development package including:

   (a) housing and community facilities and community infrastructure and community services comparable to other Northern communities;

   (b) the cost of developing Reserve land for agricultural purposes, including the cost of clearing, breaking, fencing, equipment, facilities and livestock;

   (c) the cost of helping community people to develop a capability to pursue alternatives to the rapidly disappearing traditional economy, including necessary vocational training and related capital costs.

2. On-going programs and services comparable to those received by other Indians in Canada.

Item 2 of these requirements would of course normally include schools and educational programs. The Band feels however that it has special problems in that area which require special mention and consideration, so the matter of education will be dealt with under a separate head. Item 1.(c), which is also a special need of the Band, is however also mainly referable to the area of education, and will be included under that separate sub-head.

The claim now being considered is addressed primarily to Canada, although the Band does not rule out the possibility of the integration of certain of those services with services being offered by the Province once all outstanding claims have been settled and the atmosphere permits of harmonious on-going relationships.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Band's Position (cont'd.)

The Band places special emphasis on the necessity to be provided annually with assured core funding to enable it to prepare its budgets for administration of its affairs in accordance with the concept of on-going responsible self-government discussed under Claim 9 below. This is another area where early agreement on the population figure of membership in the Band, or on those to be regarded as members of the community for purposes of entitlement and administration, is essential to progress is disposing of the claims.

Position of Canada

As to the matters included in Item 1. of the Band's Position, Canada is already on record in a letter dated December 14, 1983, from the then Federal Minister to the Hon. Mr. Pahl, as proposing "a 'catch up' program of housing, community infrastructure, and economic development". The purpose of this program has been described as bringing the Reserve community to a level comparable to other Bands in Northern Alberta.

As to Item 2. under the Band's Position, it is understood that this is also the position of Canada. Canada is prepared to discuss with the Band the type and level of services involved and the method of delivery.

With respect to the whole, however, representatives of Canada have stated that although there is no reservation in principle, there will be problems in relation to matters such as how many are to be included in the community which is to be moved to the Reserve, and the pace at which it is possible to implement delivery of full-standard services. As to provision of housing, school and community buildings, infrastructure, etc., again there is no disagreement in principle with an accelerated program, but there will be practical problems in implementation. It is estimated that for a community of 300, total costs of design, construction and installation would be in the order of $25,000,000.00 (1985 prices).

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General

Position of Canada (cont'd.)

Representatives of Canada have emphasized that clearly discussion and agreement will be necessary as to phasing of construction and of implementation of social service programs.

Position of Alberta

Alberta is not primarily involved in provision of the socio-economic development package envisaged here. Alberta has however shown no disinclination to extend to the Band the benefits of Provincial social services and programs for which its members may be qualified or eligible, and appears ready to discuss integration of Provincial and Federal services in this context.

Remarks - Including Areas of Possible Reconciliation or Accommodation

It appears that there is agreement in principle here, and that there should be no great obstacle to working out the details of such a program or programs. These will have to include the matter of the time limit within which, or at any rate the objective as to the earliest date when, the physical phases of establishment - construction of buildings, infra-structure, breaking and sowing of land, introduction of livestock, etc. - should be completed. A program phased over a period of five years has been suggested, with appropriate support measures to sustain the Band during the process of moving and becoming established.

The need to settle the numbers of persons to be included in the community for whom these facilities and services are being provided emphasizes the urgency of early agreement between Canada and the Band on the population matter.

Negotiations will of course be required to determine the level of assistance to be provided. Subsequently, an on-going consultation mechanism would likely be required to monitor progress and co-ordinate activity, including parallel activity which may be agreed to be undertaken by Alberta in these areas.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(a) General
Remarks - Including Areas of Possible Reconciliation or Accommodation (cont'd.)

In fact, agreement was reached some months ago that representatives of the Band would meet with Regional and National officials of the Federal Department to discuss these matters, and that a memorandum would be prepared outlining areas of specific agreement and indicating those areas where further discussion or negotiation is necessary. I understand that such meetings have taken place, co-ordinated by Mr. J.R. Wright, the special Liaison Officer appointed by Canada to assist in this Inquiry. I hope that report or memo as suggested may be available in the near future.

(b) Education

Band's Position

The Band is strongly opposed to the school system presently in effect. Under this system as I understand it, the School Board constituted by the Band has no true autonomy or authority with respect to the levels and standards of schooling provided for children of the community, but has merely an advisory role, the administration and decision-making processes being entirely those of the Northlands School District, a Provincial organization, with most of the children from the community being bussed for considerable distances to and from provincially-run school(s).

The position of the Band is that planning provision should be made now for the opening of a school on the Reserve as soon as they are settled thereon, that school to be under Federal jurisdiction. That school should admit also children of non-status or Metis people who, although not members of the Band, are recognized as members of the community under the self-government structure envisaged for the future. The school should be administered by the Band's School Board, the constitution of which now provides for participation by non-status members. The objective is that there should be one school, on the Reserve, administered by the Band, for all children of school age who are members of families within the community.

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(b) Education
Band's Position (cont'd.)

Particular emphasis is placed on the need to provide in the school system for programs of vocational and technical training, and related capital costs thereof, to enable Band members to acquire the skills necessary to live in the rapidly changing economy and environment brought about by development, and to take advantage of employment opportunities therein. (See Item 1.(c) under sub-head (a) of this Claim above.)

The Band accepts, however, that it is most desirable that the programs of education carried out and the standards maintained in the school should be such that children leaving it, or graduating from it, should be qualified and eligible for admission at equivalent grades into schools or post-secondary institutions in the Provincial system. It wishes also that its School Board be authorized, and endowed with the capacity, to enter into reciprocal arrangements with other communities for attendance of pupils from one community at schools of the other or others, particularly at secondary school levels. It looks forward to the opportunity to enter into discussions with appropriate authorities of Canada and Alberta to work out these and other details.

Position of Canada

Canada has not as yet indicated any position in detail to me, although again it was emphasized that, notwithstanding that there is no reservation in principle, there may be practical problems with respect to the pace at which the delivery of full educational programs, including the establishment of a school, can be carried out. It is understood that these matters are also included in the discussions between Band and Regional and National departmental officals arranged by Mr. Wright, referred to above under sub-head (a) of this Claim.

Position of Alberta

As I understood them, representatives of Alberta have indicated that, since responsibility in this field will be

Claim - 8. CATCH-UP DEVELOPMENT AND SOCIAL BENEFIT PROGRAMS:
(b) Education
Position of Alberta (cont'd.)

primarily that of Canada once the Band is settled on its Reserve, it will be for Canada to indicate to what extent, if any, it is desired that the Provincial education system should be involved in the matter of providing schooling and technical training for the Band. Alberta is willing to take part in discussions of this matter, if desired.

Remarks - Incuding Areas of Possible Reconcilation or Accommodation

It was my understanding that the whole matter of education, including the responsibility for financing the construction of a school on the Reserve, and the constitution and authority of the Band's School Board to administer the education program, was included in the discussions at the meetings between Band representatives and Departmental Officials arranged by Mr. Wright, referred to earlier. These discussions were to include the Band's concept that the structure to be established should provide for the allocation of funds annually, through the overall budgetary process discussed under the next head, to meet the requirements of the agreed educational program, such funds to be administered by the Band's School Board which will be responsible for carrying out that program.

One matter which it would appear most desirable to canvass as well is the establishment of uniformity of standards and grades so as to ensure that when it is desired, or becomes necessary, for pupils to move from one school to another or when they reach graduation level, the move to the other school or into the institution of higher learning may be accomplished without loss of grades or of an academic year or similar problems. This matter will of course involve discussion with and agreement of Provincial authorities.

I look forward to receipt of the report of the meetings with Departmental Officals already referred to, and will be glad to assist in any way in arranging discussions at any stage with the appropriate Provincial authorities.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Band's Position

The Band claims the right to self-government, once established on its Reserve, including the right to determine who will be members of the Band. The objective in this last respect is that the Band in effect should constitute a continuing community, including initially and caring for all persons of known aboriginal ancestry and historic ties to the traditional lands of the Lubicon Lake people and their descendants, although membership may thereafter be denied to children who are the issue of a union between a non-member and a member who himself or herself has one non-member parent.

The Band has submitted a document entitled GOVERNMENT OF THE LUBICON LAKE PEOPLE which comprises a detailed and considered constitution embodying its proposals for the determination of who will be its members, their rights, and the organization, powers and responsibilities of its government. This document is hereinafter referred to as "the Constitution".

It is the Band's position that once this self-governing structure is in place, the Band should be entirely autonomous with respect to the regulation and adm. stration of its affairs such as the establishment, maintenance and operation of local services including (amongst others) fire and police protection, health, education, welfare and many other enumerated activities and services. The specified powers include also the regulation, construction, maintenance and repair of buildings and the construction, maintenance and regulation of public works and community infrastructure.

The concept, which Band representatives emphasized, is that Canada would no longer administer these or other matters directly for the Band, but rather would continue to provide only block funding annually. This funding might designate the types or categories of purposes to which the funds may be applied, but the actual division of such funds and allocation thereof to specific purposes would be determined by the Band's Governing Council in accordance with and under the authority of its own annual budget prepared for that purpose.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Band's Position (cont'd.)

The proposed self-government Constitution provides also that the balance of monies which may be realized from the settlement of all the Band's land claims here under consideration, together with moneys to be derived from resource royalties, will not be distributed among Band members on a per capita basis, but rather will be invested and the interest income therefrom used only, as authorized from time to time by the Governing Council, to meet the cost of such programs and purposes as shall be approved in such authorization.

Position of Canada

Canada has not as yet indicated any precise position with regard to the details of this proposal. It is understood, however, that an increasing degree of autonomy and self-determination by Bands in matters of local concern is in fact an objective of Federal policy. Canada has also pointed out that the right of an Indian Band to control its own membership in the future has now been provided by legislation (Bill C-31).

Position of Alberta

Alberta is not involved in the matters under consideration here except to the extent noted in the Remarks section hereunder. Its position will be discussed there.

Remarks - Including Areas of Possible Reconciliation or Accomodation

As already observed, the objective of the Band in terms of self-government and self-determination in respect of membership are in general consonant with the policy of Canada in these areas. Subject to the reservations hereafter noted, it is anticipated accordingly that specific agreement, or accommodation, between the Band and Canada with respect to a large part of the detail in the Band's proposed Constitution can be reached in further discussions, or may already have been reached in the meetings arranged for by Mr. Wright. As to the matters where agreement or accommodation will be more

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

difficult, these will be of concern to both Canada and Alberta. I shall defer consideration of them until after mentioning the one or two areas which involve the Band and Alberta alone.

Here reference is made first to para. (c) of Clause 4, the clause which sets out the Powers of the Governing Council of the Band (therein referred to as the Lubicon Lake People) under the proposed Constitution. This particular provision would empower the Council to make by-laws for the purpose of:

> Wildlife management and environmental protection throughout the traditional lands of the Lubicon Lake people including pollution control, the protection of historic and cultural sites, the protection of natural flora and fauna, the protection of wildlife breeding grounds and the regulation of hunting, trapping and fishing;

This is consistent with the corresponding provision in para. (a) of Cl. 3, the Objects clause.

This raises once again the question of whose is, or will be, the authoritiy to control and manage these matters in this area. The Band's position is as set out under Claim 3 above: that as part of the settlement of all these matters it should be recognized that it has the authority to manage the wildlife resource and protect the environment in its traditional area in order to ensure that those members who depend on hunting and trapping for their livelihood will be assured of the wildlife stocks to make that right a practical reality, and that this must be reflected in a program set up to give effect thereto.

The Band has indicated a willingness to discuss with Alberta the setting up and implementation of such a program giving the Band effective control and decision-making authority. Alberta, while maintaining that it has constitutional jurisdiction in this field, has expressed a willingness to consider and discuss the setting up of a "model management program" which will recognize and protect the Band's interests and

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

concerns in this area. It is noted that the regulation-making power contemplated in the provision above set out is subject to the introductory words of Cl.4 of the proposed Band Constitution which governs all the policies and by-laws within the scope of that Clause - that is, that they shall be "not inconsistent with the Canadian Constitution". I can only express the hope accordingly, that in those discussions especially - although also in all discussions which follow hereafter - the parties will have due regard to the considerations and objectives outlined earlier on pages 22 - 31 so that they may reach the haven of an agreement which reflects and carries into effect the desired aims without foundering on the rock of rigid positions on exclusive constitutional or legal authority.

And I hope I may be permitted to suggest also that the Band's representatives might consider holding in abeyance their position on the formality of the wording of the provision under discussion here, until it is seen whether some modification is indicated to reflect in legislative form the substance and reality of the program as actually agreed.

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

Another matter where the wording of the Band's draft Constitution may be expected to raise concern on the part either of Canada or Alberta, or both, arises as a result of the somewhat sweeping language of other provisions giving the Governing Council law-making powers and exempting its members from liability for official acts. These include paras. 4(d) and (g) of Cl. 4 relating to the punishment of persons for acts committed on the Reserve (including reference to "convicted offenders"); and Cl. 45 as to limitation of liability. I do not wish to appear to assume the authority to lay down a rule as to constitutional law, but it does occur to me that the two first-mentioned provisions might be construed as trenching on the field of criminal law reserved to the exclusive jurisdiction of the Parliament of Canada, while the other may appear to conflict with the exclusive jurisdiction of the Province to legislate with respect to property

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

and civil rights. I recognize that this conflict would not arise if the subject-matter were confined to relationships arising only within the Reserve, but the scope of the matters or acts here set out with respect to which liability would be limited clearly includes relationships having effect, and with persons, outside the Reserve.

I raise these matters for consideration only.

Finally mention must be made of Cl. 16 of the draft. While it is entirely understandable, and in keeping with developing policy, that the Band should wish that its own rules and regulations should prevail with regard to governance of its own affairs on its Reserve, there is no doubt that the scope of the matters with respect to which the power to institute policies and enact by-laws is given throughout this Constitution is in many cases such that they could have effects which would be felt off the Reserve as well. With this in mind, I cannot fail to observe that it seems not only unrealistic, but unnecessarily provocative and prejudicial to the atmosphere for constructive discussion and settlement of differences, to include in this draft a provision which asserts, as this one does, that in the event of any inconsistency or conflict with Acts of Parliament or of the Alberta Legislature, the Band by-laws shall prevail. I would strongly urge a re-consideration of this wording.

Having made these observations, I wish nevertheless to record my respectful opinion on two matters of principle. First, that it is desirable that the Band should be given, and should assume, the widest powers of self-determination and self-government to enable its members to realize the concept of the preservation and continuance of their way of life as an Indian community in a manner that is compatible with a balance between their rights and interests and those of others with whom they must live in harmony. And second, that notwithstanding the reservations I have taken the liberty of expressing as to certain specific provisions, my view is that this draft represents a commendable and constructive effort to turn that concept into reality. I hope that

Claim - 9. RIGHTS OF SELF-GOVERNMENT, INCLUDING DETERMINATION OF MEMBERSHIP

Remarks - Including Areas of Possible Reconciliation or Accomodation (cont'd.)

the considerations I have put forward may assist in discussions which will lead to the working out of agreement on those modifications which will render this draft an acceptable Constitution for Band self-government.

CONCLUSION

The purpose of all the foregoing has been to set out the positions of Canada, of Alberta and of the Band, and of others where such interests exist, regarding the various "Points for Discussion" advanced by the Band to the Minister on 26th November, 1984, together with my appreciations of those various positions and their impact on my efforts to date in this Inquiry. Although delayed somewhat, this Discussion Paper now serves, in accordance with the schedule of activities agreed upon by the three major participants with me at the outset of the Inquiry, both to summarize agreements and areas of commonality between two or more of Canada, Alberta and the Band and, as well, serves as the basis for the contemplated further round of discussions between those parties to be conducted as the next stage of this Inquiry. As I have remarked in the past, I very much hope that it will be agreed that this further round of discussions will consist of meetings for the most part directly between representatives of Canada, Alberta and the Band.

I did not propose, by the summations and observations contained in this Paper, to preclude further discussions regarding development of the respective parties' positions or accords which may arise between them on various matters in subsequent discussions. My purpose rather has been to record for the benefit of all parties in their future approach to the various matters touched upon in this Inquiry my understandings of the facts and attitudes made known to me as at the time of writing, as well as attempting where possible to lay the basis for agreements to be embodied in my Final Report to the Minister which is to be the product of this Inquiry. Nor do I, for that matter, hold the absolute

CONCLUSION (cont'd.)

expectation at this time that the contemplated further round of discussions may not alter to some degree my present appreciations with respect to the various topics of the Inquiry which are set out by me in the body of this Discussion Paper.

It is my hope, and I trust, that this document will provide the basis for a comprehensive and acceptable resolution of the Lubicon Lake Band issue. In order to move the matter forward, I shall be in touch soon with all concerned to arrange for the schedule of further meetings.

DATED AND DELIVERED the 7th day of February, 1986.

VANCOUVER, B.C.
7TH FEBRUARY, 1986

Hon. E.D. Fulton, P.C., Q.C.

APPENDIX "A"
to
Discussion Paper dated 28th November, 1985
(ref. pp.42 ff)

EXTRACTS FROM TREATY 8
- Treaty Benefits

Paragraph A

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Paragraph B

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless thereby some exceptional reason, to be paid only to heads of families for those belonging thereto.

Paragraph C

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

Paragraph D

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

Paragraph E

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of the Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

APPENDIX "B"

to

Discussion Paper dated 28th November, 1985

(ref. pp.70 ff)

BAND'S SUMMARY OF EXPENSES AND COSTS

to Nov.28, 1984

Loan Interest[1]	166,018.51
Operating Costs	
Incorporation	1,005.56
Bank Charges	227.25
Meeting Expenses	1,820.46
Office Supplies, Postage & Deliveries	5,327.84
Reproduction	19,489.30
Telephone	18,326.63
Board Travel	32,400.85
Audit	1,650.00
Miscellaneous	416.35
Total Operating Costs	$ 80,664.24
Field Worker Fees & Travel	$ 5,429.05
Legal Fees & Expenses	$880,124.46
Research Fees & Expenses	$ 9,699.65
Technical Fees & Expenses	$234,820.74
Management Fees & Expenses	$163,040.61
GRAND TOTAL	$1,539,797.26

NOTE

Loan Interest calculations are up to September 30, 1984, because the bank statement has not yet been received. Monthly interest charges run at approximately $9,500.00.

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